Central Law Journal.

ST. LOUIS, MO., APRIL 6, 1900.

Considerable interest has been aroused by the decision of the case of Inter-Ocean Publishing Co. v. Associated Press, by the Supreme Court of Illinois, involving the question as to the illegal character of that corporation known as the Associated Press and its monopolistic regulations. Among other regulations made and enforced by it was one whereby the members of the association contracted not to purchase news from another association declared to be antagonistic to the Associated Press, the penalty provided for violation of the regulation, as provided by the by-laws, being the forfeiture of rights under the agreement. The Chicago Inter-Ocean, in defiance of this rule, purchased news from the New York Sun, which previously had been declared antagonistic to the Associated Press. Both the circuit court of Cook county and the intermediate appellate court held that, as the Inter-Ocean had violated its contract with the Associated Press, it could not hold the latter to a performance of it. The supreme court, however, has now reversed the decision of the lower courts, holding that any newspaper in the Associated Press can obtain news from any source whatever, without being subjected to a deprivation of the news service of the Associated Press, which must furnish its news to all applicants on equal terms, being thus in the nature of a common carrier. The cause was remanded with directions to issue the injunction prayed for by the Inter-Ocean restraining the Associated Press from suspending its news service to the Inter-Ocean because of its using news supplied to it by the New York Sun and other news agencies to which the Associated Press is hostile. Under the by-laws of the Associated Press it was justified in disciplining its members who dealt with news agencies contrary to its prohibition, by fine and suspension from the privileges of membership, and the court holds that the result of such a by-law being to create a monopoly of the news, the by-law is contrary to the public policy of the State of Illinois and hence void.

While it was, perhaps, not necessary to the decision of the case before it, the court went further and held that the whole scheme of restricting the benefits of the corporation's business to favored papers was likewise contrary to public policy.

The recent case of Maxwell v. Dow, decided by the United States Supreme Court, involves the question as to the power of a State to provide for a jury of a less number than is required by the common law. The constitution of the State of Utah contains the following provisions: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused, with the consent of the State, or by indictment, with or without such examination and commitment. The grand jury shall consist of seven persons, five of whom must concur to find an indictment; but no grand jury shall be drawn or summoned unless, in the opinion of the judge of the district, public interest demands." * * * "The right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

The Supreme Court held that these provisions were not void as being repugnant to the federal constitution. The contention of defendant, who had been convicted in accordance with these provisions, and who had thereafter instituted *habeas corpus* proceedings, was that his conviction was in violation of the constitution of the United States, which provides that no person shall be convicted of crime except by due process of law which, in the contention of the petitioner, meant a trial by jury in accordance with the practice of the common law requiring twelve men, and that proceedings by information do not amount to due process of law. On this latter point the court cites Hurtado v. People of California, 110 U. S. 516, as final and conclusive. The opinion in Maxwell v. Dow does, however, discuss at considerable

length, and determines adversely the contention that proceedings under the constitutional provisions of Utah, above quoted, violate that clause of the fourteenth amendment which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

It is also expressly decided that denying the right in criminal cases, not capital, to have a jury composed of twelve persons does not deprive an accused of due process of law. As to this it is said that "trial by jury has never been affirmed to be a necessary requisite of due process of law. In not one of the cases cited and commented upon in the Hurtado case is a trial by jury mentioned as a necessary part of such process."

NOTES OF IMPORTANT DECISIONS.

SALE—STOPPAGE IN TRANSITU — INSOLVENCY OF VENDEE.—In Davis Sulphur-Ore Co. v. Atlanta Guano Co., 34 S. E. Rep. 1011, decided by the Supreme Court of Georgia, it was held that if a vendor and vendee makes an executory contract whereby the former sells to the latter certain goods, for which the latter agrees to pay at a time subsequent to the date of delivery, and if, before the time fixed for the delivery of the goods, the vendee becomes insolvent, and the vendor stops the goods *in transitu*, and resells them for less than the contract price, and thereupon brings an action against the vendee for the difference between the contract price and the price realized upon the resale, his declaration is fatally defective, unless it alleges either that he gave the vendee notice of his intention to resell or that he made a tender of the goods and demanded payment and the vendee refused to take the goods or to pay for them.

ACCIDENT INSURANCE — INTENTIONAL INJURIES.—In Matson v. Travelers' Ins. Co., 45 Atl. Rep. 518, decided by the Supreme Judicial Court of Maine, it was held that where an accident insurance policy contains a provision that the insurance shall not cover "intentional injuries, inflicted by the insured or by any other person, except burglars or robbers," the insured cannot recover of the insurer for injuries inflicted upon him by another, not a robber or burglar, who made an assault upon him, even if the injury sustained was not precisely that intended, provided the act was intentional, was directed against the insured, and some injury to him was intended. The court said:

"The plaintiff was the holder of an accident insurance policy issued by the defendant corporation, which entitled him to receive, if disabled by bodily injuries sustained through 'external, violent and accidental means,' a certain sum of money each week while the disability continued. The policy contained a clause which provided that the insurance should not cover, among other things, 'intentional injuries inflicted by the insured or by any other person, except burglars or robbers.'

"During the life of the policy the plaintiff was violently assaulted by another person, not a robber or burglar, who attempted to strike him upon the head with a stick, but the plaintiff, to protect himself, put up his arm, and received the blow thereon, and thereby sustained the injury which he claims entitles him to recover of the company. The plaintiff was without fault in the affair, and the assault upon him is admitted to have been intentional. These facts appear in the agreed statement of facts upon which the case comes to this court.

"Under these circumstances, is the plaintiff entitled to recover? We think not. Were it not for the provision that the insurance should not cover injuries intentionally inflicted by another, it might perhaps be said, as some courts have held, that, as to the insured, the injury, for which he was in no way responsible, was an accident, an unforeseen event, a casualty.

"But here the injury was sustained in one of the very ways which the policy provided should not be covered by the insurance—intentional injuries inflicted by another. An act may be intentional, while its result may be unforeseen and unintentional, and therefore accidental, within the meaning of the contract of insurance. But that is not so in this case. Here the act was intentional. It was directed against the insured, and direct injury to the insured was intended.

"All the cases that have been called to our attention, in which a similar provision of an accident insurance policy has been considered, hold that where the injuries sustained by the insured were intentionally inflicted by another, and where the intentional acts of another that caused the injury were aimed at the insured, there could be no recovery. Insurance Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. Rep. 1360, 32 L. Ed. 308; Hutchcraft's Exr. v. Insurance Co., 87 Ky. 300, 8 S. W. Rep. 570; Utter v. Insurance Co., 65 Mich. 545, 32 N. W. Rep. 812.

"The suggestion made by counsel for plaintiff, that the injury sustained by the plaintiff was not the precise one intended by the person making the assault, is rather too much of a refinement. The plaintiff sustained an injury inflicted by another. That other intended to inflict injury upon the plaintiff, and accomplished his purpose. The case is clearly within the exception made by the contract of insurance."

DISTINCTION BETWEEN ASSUMED RISK AND CONTRIBUTORY NEGLIGENCE.

1. *In General.*—I will endeavor, in the short space allowed for this article, to point out the distinction between "assumption of risk" and "contributory negligence," as applied to servants or employees. I shall be satisfied if my efforts shall be instrumental in clearing up the confusion that exists in the use of those terms, and confining each to its proper sphere. The great source of confusion in the use of the two terms has been in the effort of some judges and authors to import into negligence and contributory negligence the element of willfulness, and also in the effort on the part of others to avoid what they deem the harsh consequences of a strict application of the principle of assumed risk. The most admirable and accurate definition of negligence, and which is supported by the great weight of authority, is that it is "the inadvertent failure of a legally responsible person to use ordinary care under the circumstances in observing or performing a non-contractual duty implied by law, which failure is the proximate cause of the injury to a person to whom the duty is due."[1] In 7 Am. & Enc. Ency. of Law (2d Ed.), p. 371, it is said, "That contributory negligence, generally speaking, possesses all the elements of actionable negligence, except that instead of inflicting an injury upon another, it combines with the negligence of another in proximately causing an injury to the contributorially negligent person himself," and then the author proceeds to define contributory negligence as "a want of ordinary care upon the part of a person injured by the actionable negligence of another, contributing and concurring with that negligence, and contributing to the injury as proximate cause thereof, without which the injury would not have occurred."[2] "Inadvertent" is defined as "done without consideration or intention; not proceeding from design, unintentional, accidental."[3] It will be seen from these definitions and from the weight of authority that the element of willfulness does not exist in negligence or contributory negligence.[4] Import into negligence and contributory negligence the element of "willfulness" and the distinction between "assumption of risk" and "contributory negligence" is destroyed, and "assumed risk" simply becomes a form of contributory negligence, as held by the Supreme Court of Wisconsin,[5] and Justice Brewer in O'Rorke v. Union Pacific R. Co.[6] The absence of "willfulness" from contributory negligence and its presence in assumption of risk marks the distinction between them. A servant who, in the course of his employment, voluntarily encounters dangers ordinarily incident thereto, and of which he has knowledge, or with which the law charges him with knowledge; or encounters extraordinary dangers knowingly and willfully, assumes the risk to which he thus exposes himself,[7] where there is no compulsion, emergency or fraud, and where he is not constrained to remain at his post of duty because of imminent danger which would result to the lives of

[1] 16 Am. & Eng. Ency. of Law (1st Ed.), p. 389. See also the numerous definitions of other authors there given and commented on. Inadvertence as an element of negligence is considered on page 392 of the same volume.

[2] See also definitions quoted from other authors on p. 371 of vol. 7, Am. & Eng. Ency. of Law (2d Ed.); Thomas v. Quartermaine, L. R. 18 Q. B. D. 685.

[3] Standard Dictionary of the English language.

[4] Distinction between negligence and willfulness. In Indiana the distinction between negligence and willfulness is clearly pointed out, the court saying that "Negligence arises from inattention, thoughtlessness or heedlessness, while willfulness cannot exist without purpose or design. No purpose or design can be said to exist where the injurious act results from negligence, and negligence cannot be of such a degree as to become willfulness." Parker v. Pennsylvania Co., 134 Ind. 373. See also Louisville, etc. Co. v. Ryan, 107 Ind. 51; Belt R. & Stockyard Co. v. Mann, 107 Ind. 89; Bar v. Chicago, etc. R. Co., 10 Ind. App. 433; Lake Erie, etc. R. Co. v. Brafford, 15 Ind. App. 655; Terre Haute, etc. R. Co. v. Graham, 95 Ind. 286; Cleveland, etc. R. Co. v. Asbury, 120 Ind. 289. And the distinction has also been observed in Missouri. Taylor v. Holman, 45 Mo. 371. Cases of other jurisdictions could be cited, but these will suffice for the purpose of this article. For cases in which the phrase "willful negligence" is used, see 16 Am. & Eng. Ency. of Law (1st Ed.), p. 394. But such characterization of negligence is not sanctioned by the weight of authority, nor is it well founded in reason.

[5] Peterson v. Lumber Co., 90 Wis. 83, and cases cited. See also Darcey v. Farmers' Lumber Co., 87 Wis. 249; Nadua v. White River Lumber Co., 76 Wis. 120.

[6] The justice said: "It has been said, and I think there is some force in it, that there is really no such thing as a separate and distinct defense of waiver, and that what is called waiver is simply one form of 'contributory negligence;' that the difference between waiver and contributory negligence is the difference between passive and active negligence, in omitting to do a thing which the employee ought to have done." 22 Fed. Rep. 189.

[7] Reese v. Wheeling & E. G. R. Co., 42 W. Va. 33.

others if he should refuse to encounter the danger. The doctrine of assumed risk is based upon the maxim "*volenti non fit injuria.*"[8] (Injury is not done to the willing.)[9] But this distinction between "assumed risk" and "contributory negligence" has not been observed by the legal profession generally where the one or the other of these defenses, or both, have been in issue, and hence there has arisen much confusion in the application of the two rules.[10] The two defenses are recognized both in this country and in England by a long line of decisions, in some of which the distinction between them has been discussed, viz.: "The doctrine of acceptance of risk must not be confounded with that of contributory negligence. In the former case the doctrine is that when one with full knowledge of the danger, or of the means of knowledge which he should have exercised, voluntarily remains in the employ of his master, disables himself from recovering damages, under the maxim '*volenti non fit injuria.*' In the latter case recovery is denied because the plaintiff is wanting in that degree of care which under the circumstances he ought to have used, which want of care contributed to bringing about the accident."[11] "Assuming the risk of an employment is one thing, and quite an entirely different thing from incurring an injury through contributory negligence. Generally it is sufficient in actions for the recovery of damages to give instructions as to the effect of contributory negligence on the part of the plaintiff. But when the question arises as to the effect of knowledge and the assumption of risk on the part of the plaintiff, something more is required."[12]

"One may, with his eyes open, undertake to do a thing which he knows is attended with more or less peril, and he may, both in entering upon the undertaking and in carrying it out, use all the care which he is capable of. But whether or not he thereby assumes a risk may depend upon the other circumstances."[13] Contributory negligence and assumed risk being separate and distinct, the doctrines are applicable under different conditions, contributory negligence on the part of an injured servant being such negligence on his part as co-operates with that of the master and aids in producing the injury, while the doctrine of assumed risk obtains without reference to the existence of negligence. "If a servant with knowledge of a defect in the master's premises, and of the danger and risk incident thereto, continues in the service of the master without proper notice to the latter, he assumes the risk incident to the service and growing out of the existence of the defect, and this without regard to the degree of care which he may exercise in the performance of his labors."[14] Fry, L. J., in Thomas v. Quartermaine, says: "There are two matters which often arise for discussion in these cases of negligence which are, I think, liable to be confused, and yet are inseparable in reason. The one is the willingness of the plaintiff to assume the danger; and this willingness, if assumed with full knowledge, may lessen or remove any duty of the employer to the employee, and may thus prevent the arising of any cause of action, though in the discharge of the work undertaken the workman may have been guilty of no negligence. The other is the negligence of the plaintiff which may have placed him in circumstances of difficulty or danger, or which when he is placed in such circumstances may have contributed to the injury. Here there may have been no willingness to enter the

[8] Gorman v. Des Moines Brick Mfg. Co., 99 Iowa, 257; Thomas v. Quartermaine, L. R. 18 Q. B. D. 685, 702; Membery v. Great Western Ry. Co., L. R. 18 App. Cas. 179; Thrussell v. Handyside & Co., L. R. 20 Q. B. D. 359; Yarmouth v. France, L. R. 19 Q. B. D. 659.

[9] Kinney's Law Dictionary and Glossary.

[10] Confusion in the Use of the Terms Contributory Negligence and Assumed Risk. See Kane v. Northern Cent. Ry. Co., 128 U. S. 91; Sneda v. Libera, 65 Minn. 337; Hanrahan v. Brooklyn El. R. Co., 45 N. Y. Supp. 474; Davis v. Western Ry. Co., 107 Ala. 626; Anderson v. C. N. Nelson Lumber Co., 67 Minn. 79; Jenney, etc. R. Co. v. Murphy, 115 Ind. 570; Way v. Chicago, etc. R. Co., 76 Iowa, 393; Poland v. Chicago, etc. R. Co., 44 La. Ann. 1003; Wormell v. Maine, etc. R. Co., 79 Me. 397; New York, etc. R. Co. v. Lyons, 119 Pa. St. 324; Chesapeake, etc. R. Co. v. Lee, 84 Va. 642; Nadua v. White River Lumber Co., 76 Wis. 120; Darcey v. Farmers' Lumber Co., 87 Wis. 247; Peterson v. Lumber Co., 90 Wis. 83; Thorpe v. Missouri, etc. R. Co., 89 Mo. 650; Alcorne v. Chicago, etc. Ry. Co. 108 Mo. 8.

[11] Gorman v. Des Moines Brick Mfg. Co., 99 Iowa, 257.

[12] Mundle v. Hill Mfg. Co., 86 Me. 400. See also Miner v. Connecticut River R., 153 Mass. 398.

[13] Miner v. Connecticut River R., 153 Mass. 398.

[14] Texas Pac. Ry. Co. v. Bryant, 27 S. W. Rep. 825. See also Railway Co. v. Somers, 71 Tex. 700; Railway Co. v. Sommers, 78 Tex. 439; Green v. Cross, 79 Tex. 130; Rogers v. Railway Co., 76 Tex. 502; Railway Co. v. Schwabble, Tex. Civ. App. 573; Railway Co. v. Conroy, 83 Tex. 214; Louisville, etc. Ry. Co. v. Corps, 124 Ind. 427; Beach, Contrib. Neg. § 140; Bailey, Master and Servant, § 197.

danger, but negligence when in it. In both these questions the knowledge of the plaintiff may have been a material ingredient. But the questions are nevertheless distinct."[15] In the same case Bowen, L. J., says: "The doctrine of *volenti non fit injuria* stands outside the defense of contributory negligence, and is in no way limited by it. In individual instances the two ideas sometimes seem to cover the same ground, but carelessness is not the same thing as intelligent choice, and the Latin maxim often applies where there has been no carelessness at all. A confusion of ideas has frequently been created in accident cases by an assumption that negligence to the many who are ignorant may be properly treated as negligence as regards one individual who knows and runs the risk, and by dealing with the case as if it turned only on a subsequent investigation into contributory negligence. In many instances it is immaterial to distinguish between the two defenses. * * * A confusion in applying the first of these two broad principles to the special case of master and servant has at times arisen out of the fact that by the contract of service the workman was deemed to have taken upon himself the ordinary risk of a business lawfully carried on upon his master's premises, and it has been assumed as an *a fortiori* case that he took upon himself such risks as were visible or known. This is one way of putting the defense, and may in many cases be sufficient, but there is another way of stating it and another principle wholly independent of contract on which a similar defense arises. The law is full of instances where duties assume a double aspect and may be viewed concurrently as arising by implication out of a contract, or as created by some wider principle of law which happens to take effect and to receive apt illustration in the particular instance of some particular contract. It is in most cases a barren and metaphysical inquiry to discuss whether such duties are best treated as arising by implication from the contract or from the general law outside, and down to the employees' liability act, 1880, it may have been less important, in the case of visible and apparent risks, which explanation of the master's immunity was given."[16] One may accept employment in a service of a perilous character, and yet not be guilty of contributory negligence, although he does assume all the risks incident to the service.[17]

2. *Voluntary Assumption of Risk—State of Mind.*—In some recent English cases the question as to what state of mind a person must be in to warrant a finding that he voluntarily assumed a risk, or that there was *volens* within the meaning of the maxim *volenti non fit injuria*, has been discussed. Lord Bramwell, in Membery v. Great Western Ry.,[18] takes the position that where a person is not physically constrained, but may at his option do a thing or not, and he does it, the maxim *volenti non fit injuria* applies. He also holds that there is no middle ground between *volens* and *nolens;* that a man is either one or the other; that notwithstanding an employee complains of a danger but chooses to remain in the employment rather than to quit it, he is *volens* and assumes the risk; while Lindley, L. J., in Yarmouth v. France,[19] holds that where a servant finds himself exposed to a danger which he never engaged to incur, and complains of it, he cannot, as a matter of law, be held to have impliedly agreed to assume the risk because he does not refuse to face it; that if an employee knows of a danger and reports it, but on being told to go on with his work, goes on to avoid dismissal, he does not act voluntarily in the sense of taking the risk upon himself, but fear of dismissal, rather than voluntary action, may properly be inferred.[20]

[15] L. R. 18 Q. B. D. 685, 702.

[16] See also Conley v. American Express Co., 86 Me. 352, in which it is said: "An assumption of the risk of an employment by a servant will bar recovery independently of the principle of contributory negligence." Appreciation of Risk: There is a class of cases which recognize the doctrine that mere knowledge of a danger will not preclude a recovery for an injury thereby unless the injured person appreciated the risk. Mundle v. Mfg. Co., 86 Me. 400; Linnehan v. Sampson, 126 Mass. 506; Williams v. Churchill, 137 Mass. 243; Taylor v. Carew Mfg. Co., 140 Mass. 150; Scanlan v. Boston & Albany R., 147 Mass. 484; Thomas v. Quartermaine, L. R. 18 Q. B. D. 685; Yarmouth v. France, L. R. 19 Q. B. D. 647.

[17] Louisville, etc. Ry. Co. v. Sandford, 117 Ind. 265. One may without being guilty of contributory negligence engage in the manufacture of gunpowder or dynamite, yet in such service he assumes all the risk incident to it.

[18] L. R. 14 App. Cas. 179.

[19] L. R. Q. B. D. 647.

[20] See also Woodley v. Metropolitan Dist. Ry. Co., L. R. 2 Exch. D. 384. Distinction between "Scienti" and "Volenti:" For discussion as to, see Thrussell v. Handyside & Co., L. R. 20 Q. B. D. 359; Thomas v.

3. *Assumed Risk—Illustrative Cases.* — Dangers incident to unblocked frogs are assumed by a switchman who enters the service of a railroad company with knowledge that its frogs are unblocked.[21] One who for eight months was in the employ of a railroad company and had done repair work on cars day after day without a flag, knowing its necessity but making no complaint and asking for no change, assumed the risk of the danger, knowing what it was, and cannot hold the company responsible, notwithstanding its negligence.[22] A brakeman injured by being knocked off a car by the arch of a bridge, which was constructed too low, of which defect he had knowledge, having passed under the arch daily for seven months, assumed the risk incident to the defective construction.[23] One engaged in loading coal from a dock in the nighttime, who was injured while going from one part of the dock to the other upon the railroad company's tracks in the course of his employment, by being struck by an empty car which was being let down the track at a greater speed than usual and without warning, assumed the risk of the danger, where he knew that a car was liable to come at any time.[24] A servant who was directed to load a car, and chose his own manner of doing it, and was injured by choosing a hazardous mode, assumed the risk, where the danger was as apparent to him as to any one, and he could have chosen a mode not hazardous.[25] One in charge of elevator machinery who attempted to clean out the conveyor with his hand while the power was on and the conveyor likely to move, of which fact he had knowledge, assumed the risk incident thereto, where he might have stopped the machinery while he was cleaning the conveyor.[26] These illustrations will be sufficient for the limited scope of this article. I append a few other cases which fairly illustrate the principle of assumed risk and which the reader can examine if his interest leads him farther.[27]

4. *Contributory Negligence — Illustrative Cases.*—An experienced employee in a saw mill is guilty of contributory negligence, where he received injuries by his hand coming in contact with a rapidly moving saw while he was attempting to remove sawdust which was clogging the sawdust carrier, the unguarded condition of the saw and the danger being easily discernible by slight inspection which he failed to make.[28] A switchman who could easily have boarded an engine by getting on at the side, but for that purpose voluntarily stepped in front of the engine and was injured because of his slipping and falling, is guilty of contributory negligence.[29] A switchman whose hand was injured by being caught between the deadwoods of cars was guilty of contributory negligence, where he attempted to make the coupling with a short stick without observing the speed of the moving car, there being no emergency rendering it necessary to make

Quartermaine, L. R. 18 Q. B. D. 692; Yarmouth v. France, L. R. 19 Q. B. D. 659.

[21] Railway Co. v. Davis, 54 Ark. 389, in which case the court said: "We think confusion has sometimes crept into cases like this from the effort to determine them by the rules of contributory negligence. We do not think they necessarily furnish the correct criterion for determination, but that the contract of employment is a necessary element of consideration." See also Lake Shore, etc. R. Co. v. McCormick, 74 Ind. 447; McGinnis v. Canada S. B. Co., 49 Mich. 466; Sweeney v. Berlin & Jones Envelope Co., 101 N. Y. 520; Diehl v. Lehigh Iron Co., 21 Atl. Rep. 430; Chicago R. Co. v. Lanergan, 118 Ill. 41; Wood v. Locke, 147 Mass. 604; Rush v. Missouri Pac. R. Co., 28 Am. & Eng. R. Cas. 484; Davis v. Ry. Co., 53 Ark. 117; Grand v. Mich. R. Co., 47 N. W. Rep. 837, 841.

[22] O'Rorke v. Union Pac. Ry. Co., 22 Fed. Rep. 189. See also Southern Pac. Co. v. Pool, 160 U. S. 438.

[23] Administrator of Corbine v. Bennington & Rutland R. Co., 61 Vt. 348, in which case it was said: "Having assumed the perils of his employment in respect of the bridge, the question of contributory negligence was not in the case, for if he was not guilty of it he had no right of recovery."

[24] Osborne v. Lehigh Val. Coal Co., 97 Wis. 27.

[25] St. Louis Bolt & Iron Co. v. Brennan, 20 Ill. App. 555.

[26] Star Elevator Co. v. Carlson, 69 Ill. App. 212. See also Chicago & Tomah R. Co. v. Simmons, 11 Ill. App. 147; St. Louis Bolt & Iron Co. v. Brennan, 20 Ill. App. 555. In Chicago & Tomah R. Co. v. Simmons, the court says: "We understand that a party who voluntarily exposes himself to a danger that he knows, or by reasonable attention to the means might know, assumes all the risks, and is absolutely barred of a recovery for an injury resulting from it, even as against one whose negligence created it."

[27] Foley v. Jersey City Electric Light Co., 54 N. J. L. 411; Norton Bros. v. Sczpurak, 70 Ill. App. 686; Donahue v. Drown (Mass.), 27 N. E. Rep. 675; Manzi v. Friedline, 53 N. Y. Supp. 482; Garety v. King, 41 N. Y. Supp. 633; Colorado Fuel & Iron Co. v. Cummings, 8 Colo. App. 541; Texas Pac. Ry. Co. v. Bryant (Tex.), 27 S. W. Rep. 825; Pittsburg & Connellsville R. Co. v. Sentmeyer, 92 Pa. St. 276; Louisville, etc. Ry. Co. v. Sandford, 117 Ind. 265.

[28] Anderson v. C. N. Nelson Lumber Co., 67 Minn. 79.

[29] Ferguson v. Chicago, etc. R. Co., 100 Iowa, 733.

the coupling in that manner.[30] A brakeman was guilty of contributory negligence in regard to injuries sustained by the breaking of a link, where the injury was caused by his neglect to inspect it as required by the rules of the company, a compliance with which would have disclosed its defective condition.[31] One who needlessly walked so near a railroad track that he was struck by a caboose approaching from the rear was guilty of contributory negligence.[32] A brakeman injured by a waterspout standing dangerously near the car, while descending a ladder on the side of the car, was guilty of contributory negligence in descending the ladder without observing the spout, where it was obvious and he had had numerous opportunities of observing its position.[33] These are only a few of the numerous cases that could be used to illustrate the principle of contributory negligence, and the reader who desires to pursue the subject further will have no trouble to find cases enough in the digests and text books. I append a few cases which are decided on the principle of contributory negligence but which should have been governed by the principle of assumed risk.[34]

5. *Whether Continuing in a Service After Knowledge of a Danger* attending it constitutes contributory negligence or assumed risk has been variously decided in the different States and sometimes in the same State, the authorities being very equally divided on the question. The appended note gives a classification of cases by States on both sides of the question.[35] There is a distinction between continuing in an employment after knowledge of a defect in an appliance furnished the employee and continuing after knowledge of a danger growing out of the defect. Knowledge of the defect alone will

[30] Southern Railroad Co. v. Arnold, 114 Ala. 183.

[31] Alabama, etc. R. Co. v. Carroll, 52 U. S. App. 442, 84 Fed. Rep. 772.

[32] Dyer v. Fitchburg R. Co., 170 Mass. 148.

[33] Pennsylvania Co. v. Finney, 145 Ind. 551.

[34] Chicago Central v. Kansas City R. Co., 98 Iowa, 554; Chicago, etc. R. Co. v. McGraw, 22 Colo. 363; Cowles v. Chicago, etc. Ry. Co., 102 Iowa, 507.

[35] English Decisions — Contributory Negligence: Griffiths v. Gidlaw, 3 H. & N. 648; Weblin v. Ballard, 17 Q. B. D. 122; Senior v. Word, 1 El. & El. 385. Assumed Risk: Saxton v. Hawksworth, 26 L. T. (N. S.) 851; Smith v. Baker, A. C. 325 (H. L. E. 1891), and cases cited. Federal Cases—Contributory Negligence: Haugh v. Railroad Co., 100 U. S. 213; Northern Pac. R. Co. v. Moses, 123 U. S. 710; Kane v. Northern Cent. R. Co., 128 U. S. 91. Assumed Risk: Washington, etc. R. Co. v. McDade, 135 U. S. 554; Baltimore, etc. R. Co. v. Baugh, 149 U. S. 368; Southern Pac. R. Co. v. Seley, 152 U. S. 143. Alabama—Contributory Negligence: Eureka Co. v. Bass, 81 Ala. 200; Wilson v. R. Co., 85 Ala. 264; Highland Av. R. Co. v. Walters, 91 Ala. 442. Arkansas—Assumed Risk: St. Louis,, etc. R. Co. v. Davis, 54 Ark. 389; Fordyce v. Lowman, 57 Ark. 160. California—Assumed Risk: McGlynn v. Brodie, 31 Cal. 376; Snowton v. Men. Co., 55 Cal. 443; Sweeney v. Railroad Co., 57 Cal. 15. Colorado—Assumed Risk: Burlington, etc. R. Co. v. Liehe, 17 Colo. 280. See Colo. Cent. R. Co. v. Ogden, 3 Colo. 500. Connecticut—Assumed Risk: Hayden v. Manufacturing Co., 29 Conn. 548. Florida—Assumed Risk: Florida, etc. R. Co. v. Weese, 32 Fla. 212. Georgia—Contributory Negligence: Baker v. Western, etc. R. Co., 68 Ga. 699. Illinois—Contributory Negligence: Rolling Stock Co. v. Wilder, 116 Ill. 100; Illinois Steel Co. v. Schymanowski, 162 Ill. 459. Indiana—Assumed Risk: Louisville, etc. R. Co. v. Corps, 124 Ind. 429; Rogers v. Leyden, 127 Ind. 50; Ames v. Lake Shore, etc. R. Co., 135 Ind. 363; Louisville, etc. R. Co. v. Sandford, 117 Ind. 265; Indianapolis, etc. R. Co. v. Watson, 114 Ind. 20. Iowa—Assumed Risk: Perigo v. Railroad Co., 52 Iowa, 276; Youll v. Railroad Co., 66 Iowa, 346; Kroy v. Chicago, etc. R. Co., 32 Iowa, 357. Kansas — Contributory Negligence: Jackson v. Railroad Co., 31 Kan. 761. Assumed Risk: McQueen v. Railroad Co., 30 Kan. 689; Rush v. Railroad Co., 36 Kan. 129; Railroad Co. v. Schroeder, 47 Kan. 315. Kentucky — Contributory Negligence: Lawrence v. Hagemeyer, 20 S. W. Rep. 704. Assumed Risk: Bogenschutz v. Smith, 84 Ky. 330; Morton v. Railroad Co., 30 S. W. Rep. 599. Louisiana—Contributory Negligence: Pollick v. Sellers, 42 La. Ann. 623; Bomaker v. Railroad Co., 42 La. Ann. 983. Assumed Risk: Corey v. Sellers, 41 La. Ann. 500. Maine—Assumed Risk: Buzzell v. Locombe Mfg. Co., 48 Me. 113; Mundle v. Hill Mfg. Co., 86 Me. 400. Maryland—Contributory Negligence: Michael v. Stanley, 75 Md. 464. Assumed Risk: Baltimore & Ohio R. Co. v. Stricker, 31 Md. 47; Renna v. Wachter, 60 Md. 395. Massachusetts—Contributory Negligence: Snow v. Railroad Co., 8 Allen 441; Ford v. Railroad Co., 110 Mass. 240. Assumed Risk: Pingrey v. Leyland, 135 Mass. 398; Joyce v. Worcester, 140 Mass. 245; Hatt v. Noy, 144 Mass. 186. Michigan—Contributory Negligence: King v. Lumber Co., 20 Mich. 105; Sawoda v. Ward, 40 Mich. 420. Assumed Risk: Davis v. Railroad Co., 20 Mich. 105; Richards v. Rough, 53 Mich. 212. Minnesota—Contributory Negligence: LeClair v. Railroad Co., 20 Minn. 9. Assumed Risk: Clark v. Railroad Co., 28 Minn. 138; Bengster v. Railroad Co., 47 Minn. 486. Mississippi—Contributory Negligence: Buckner v. Railroad Co., 72 Miss. 873. Under the Mississippi Constitution of 1890, § 193, knowledge is not a conclusive defense as it had been previous to the adoption of such constitution. Missouri—Contributory Negligence: Huhn v. Railroad Co., 92 Mo. 447; Settle v. St. Louis, etc. R. Co. (Mo.), 30 S. W. Rep. 125. See Alcorn v. Chicago, etc. R. Co., 108 Mo. 8; Thorpe v. Missouri, etc. R. Co., 89 Mo. 650; Hamilton v. Rich Hill Coal Mining Co., 108 Mo. 364. Assumed Risk: Devitt v. Railroad Co., 50 Mo. 302, overruled by the cases cited under contributory negligence. Montana—Contributory Negligence: Keeley v. Mining Co., 16 Mont. 484. Nebraska—Contributory Negligence: Sioux City, etc. R. Co. v. Finlayson, 16 Neb. 578. New Hampshire—Assumed Risk: Foss v.

not defeat recovery, but continued use of it with knowledge of its dangerous condition will prevent recovery.[36]

6. *Pleading.*—In an action by a servant for personal injuries sustained in the course of his employment, the complaint must show that the risk was not one assumed as incident to the service. An allegation in such a complaint that plaintiff was free from fault will not supply the place of an averment negativing assumption of risk, as it might be true that plaintiff exercised the utmost care and also be true that he assumed the risk. An averment that plaintiff had no knowledge of the danger is essential.[37] If the action is for an injury sustained by the negligence of a fellow-servant in the course of the common employment, it must be alleged either that the master did not exercise ordinary care and prudence in the employment of the fellow-servant, or that it had retained him in its service after notice that he was negligent in the discharge of his duties, and that plaintiff at the time he entered the service had no knowledge of the negligent habits of the fellow-servant. An allegation that plaintiff was "wholly unacquainted" with the fellow-servant is insufficient, as it does not show that plaintiff was wholly unacquainted with the co-employee's negligent habits when plaintiff entered the service.[38] But plaintiff should aver that he did not know of the negligence or unskillfulness of the co-employee or have the same means of knowing thereof as defendant did.[39] In addition to an allegation that plaintiff did not have knowledge of the danger which caused the injury, negativing assumption of risk, plaintiff should allege want of contributory negligence on his part, where the burden is on him to show freedom from contributory negligence.

7. *Conclusion.*—The real distinction between assumption of risk and contributory negligence lies in the distinction between "willfulness" and "inadvertence," the former being an element of assumption of risk and the latter of contributory negligence, it being impossible for the two to exist together. To say that a willful exposure of one's self to a known danger, or, in other words, that remaining in a service after knowledge of a defect and appreciation of the danger constitutes contributory negligence, imports into contributory negligence the element of willfulness or design, for an injury under such circumstances cannot be said to have been

Baker, 62 N. H. 247. New Jersey—Assumed Risk: Foley v. Electric Light Co., 54 N. J. L. 411; Conway v. Furst, 32 Atl. Rep. 380; Western Union Tel. Co. v. McMullen, 33 Atl. Rep. 384. New York—Contributory Negligence: Davidson v. Cornell, 132 N. Y. 228; Mehan v. Syracuse, etc. R. Co., 73 N. Y. 585; Hannigan v. Smith, 50 N. Y. Supp. 845. Assumed Risk: Kaase v. Railroad Co., 139 N. Y. 369; Gibson v. Railroad Co., 63 N. Y. 449; Baker v. Sutton, 42 N. Y. Supp. 116. North Carolina — Contributory Negligence: Porter v. Western Union R. Co., 97 N. Car. 66. Ohio —Contributory Negligence: Pittsburgh, etc. Co. v. Extievenard, 53 Ohio St. 562; Mfg. Co. v. Morrissey, 40 Ohio St. 148. Assumed Risk: Med. Riv. R. Co. v. Barber, 5 Ohio St. 562; Lake Shore, etc. R. Co. v. Knittal, 33 Ohio St. 468. Oregon—Assumed Risk: Roth v. Northern P. L. Co., 18 Oreg. 205; Brown v. Oregon L. Co., 24 Oreg. 315. Pennsylvania—Assumed Risk: Runnell v. Dilworth, 11 Pa. St. 343; Mansfield Coal Co. v. McEnery, 91 Pa. St. 185; Wanamaker v. Burke, 111 Pa. St. 423; Pittsburg, etc. R. Co. v. Sentmeyer, 92 Pa. St. 276. Rhode Island—Assumed Risk: McGrath v. Railroad Co., 14 R. I. 358. South Carolina—Contributory Negligence: Parker v. S. C. & Ga. R. Co., 48 S. Car. 364. Tennessee—Assumed Risk: Railroad Co. v. Duffield, 12 Lea, 67. Texas—Contributory Negligenee: Texas, etc. R. Co. v. Brentford, 79 Tex. 619, overruled by cases cited under assumed risk. Assumed Risk: Texas, etc. R. Co. v. Conroy, 85 Tex. 216; Texas Pac. R. Co. v. French, 86 Tex. 99; Texas, etc. R. Co. v. Bryant (Tex. Civ. App.), 27 S. W. Rep. 825, and cases cited. Utah—Contributory Negligence: McCharles v. Mining Co., 10 Utah, 470. Vermont — Assumed Risk: Corbine v. Bennington, 61 Vt. 348; Dumas v. Stone, 65 Vt. 442. Virginia—Contributory Negligence: Richmond, etc. R. Co. v. Norment, 84 Va. 167. Assumed Risk: Clark v. Richmond, etc. R. Co., 78 Va. 709. Washington—Contributory Negligence: Olson v. McMurray, etc. Co., 9 Wash. 500. West Virginia—Contributory Negligence: Woodell v. Improvement Co., 38 W. Va. 23; Graham v. Coal Co., 38 W. Va. 273. Assumed Risk: Reese v. Wheeling & E. G. R. Co., 42 W. Va. 333, 348. Wisconsin—In this State assumption of risk is recognized, but it is said to be a form of contributory negligence. Peterson v. Lumber Co., 90 Wis. 83, and cases cited. See also Darcey v. Farmers' Lumber Co., 87 Wis. 249; Nadua v. White River Lumber Co., 76 Wis. 120. In preparing the above table I have made use of the cases found in the table prepared by C. B. Labatt, Am. Law Review, September, 1897, but have added others thereto.

[36] Pitts v. Florida, etc. R. Co., 98 Ga. 655. See Faren v. Sellers, 39 La. Ann. 1011; Lee v. Southern Pac. R. Co., 101 Cal. 118; Devlin v. Wabash, etc. R. Co., 87 Mo. 545; Clapp v. Minneapolis, etc. R. Co., 36 Minn. 6; St. Louis, etc. R. Co. v. McLean, 80 Tex. 85; Dumas v. Stone, 65 Vt. 442; Brooke v. Ramsden, Q. B. D. 9 Ry. & Corp. L. J. 18. See also Chaddick v. Lindsay, 5 Okla. 616; Thorpe v. Missouri Pac. R. Co., 89 Mo. 650; McMullen v. Missouri, etc. R. Co., 60 Mo. App. 231; Southern Kan. R. Co. v. Drake, 53 Kan. 1.

[37] Louisville, etc. Ry. Co. v. Corps, 124 Ind. 427. See also Louisville, etc. Ry. Co. v. Sandford, 117 Ind. 265; Bogenschutz v. Smith, 84 Ky. 330.

[38] Lake Shore, etc. R. Co. v. Stupac, 108 Ind. 1.

[39] Indiana, etc. Ry. Co. v. Dailey, 110 Ind. 75.

incurred inadvertently and according to the weight of authority inadvertence is an element of negligence and contributory negligence. A willful injury is one thing, and a negligent or inadvertent injury is quite another thing. So a negligent or inadvertent exposure of one's self to a danger is equally distinct from a willful exposure, the former constituting contributory negligence and the latter assumed risk. But whether one encountered a danger willfully or inadvertently is sometimes a difficult question, but it by no means lessens the distinction between assumed risk and contributory negligence. There seems to be a tendency in recent decisions in some of the States to observe the distinction between assumed risk and contributory negligence and to drop the term "willful negligence." It is to be hoped that the members of the legal profession will either observe a distinction between the two defenses, and cease to use the terms interchangeably, or import into negligence the element of "willfulness" and class assumed risk as a form of contributory negligence. At any rate let them be consistent.

Indianapolis, Ind. D. W. CROCKETT.

WITNESS—COMPETENCY—CHILDREN.

COMMONWEALTH v. REAGAN.

Supreme Judicial Court of Massachusetts, March 1, 1900.

Where it is objected that a witness, by reason of youthfulness, does not un erstand the nature of an oath, it is the duty of the court to examine the witness, and reject him unless satisfied of his competency, and it is error to submit the question to the jury after his testimony has been given.

HAMMOND J.: As the result of the *voir dire* examination of the witness, the judge was of the opinion that she was not competent; but no formal order or ruling was made and he permitted her to be sworn and to testify, stating that he should leave the question of her competency to the jury. In his charge to them he gave full and careful instructions as to the law material to that issue and told them that, if they found her competent, they should take her statements as evidence; otherwise, they were to disregard all she had said, and deal with the case as though she had not been called. The evidence as to her competency is not before us, but from the course taken by the judge, we must assume that in his judgment it would warrant a finding by the jury that she was competent. The defendant excepted to this course, contending that it was the duty of the court alone to decide that question. The jury brought in a verdict of guilty, and, in reply to the questions put by the court, said that they found the witness competent, and in reaching their verdict they treated her as such, and relied in part on her testimony. We assume that her testimony was prejudicial to the defendant, and therefore the simple question raised on the report is whether there was error in law in the method of dealing with the question of the competency of the witness.

Speaking generally, the text-books on evidence lay down the proposition that in a jury trial all questions as to the admissibility of evidence are for the judge. Thus Starkie says: "In civil as well as in criminal cases, the competency of an infant is a question of discretion of the court." Starkie, Ev. pt. 4, p. 393. Phillips says: "It is the province of the judge to decide all questions on the admissibility of evidence. It will be for the judge, also, to decide any preliminary question of fact, however intricate the solution, which may be necessary for enabling him to determine the other question of admissibility." 1 Phil. Ev. p. 3. And again he says that the competency of a witness is a condition precedent to admitting his evidence. "The judge alone has to decide whether such condition precedent has been fulfilled. If proof is offered by witnesses, he is to decide upon their credulity. If counter evidence is proposed, he must receive it before he decides, and he has no right to ask the opinion of the jury on the fact, as a condition precedent." *Id.* p. 6. Roscoe says: "It is for the court to decide upon the competency of witnesses, and for the jury to determine their credibility." Rosc. Cr. Ev. (12th Ed.) 100. The rule is laid down by Greenleaf, Taylor and Wharton in equally positive terms. 1 Greenl. Ev. (16th Ed.) §§ 81e, 161b; 1 Tayl. Ev. 23a; Whart. Cr. Ev. (8th Ed.) §§ 370, 373. And this is so whether the objection to the competency is made on the ground of interest, insanity or infancy. Other familiar examples of the application of the rule are where confessions or dying declarations are offered in evidence. It is stated by Greenleaf that if the decision of the admissibility of the evidence depends upon the decision of other questions of fact—as, for example, the fact of interest of the witness or the due execution of a deed—in such cases it is allowable for the judge, at his discretion, to submit the question of the admissibility of the evidence to the jury, with instructions to consider it as evidence, or not, according as they decide that question. 1 Greenl. Ev. (16th Ed.) § 81e; Gordon v. Bowers, 16 Pa. St. 226. But these cases are regarded as exceptions to the general rule, and it may be doubted whether the language of Greenleaf is not too broad, as applied, at least to the practice in England and to criminal cases. See 1 Phil. Ev. 6, and the language of Erle, J., during the argument in the case of Jenkins v. Davies, 10 Q. B. 314, 320, and of Denman, C. J., in delivering

the judgment of the court in the same case, at page 323. But, whatever may be the scope of this exception, it is certain that in the case of dying declarations, infancy and insanity the rule itself is very strictly adhered to. It is true that in Rex v. Woodcock, 1 Leach, 500, Eyre, C. B., left to the jury the question whether the deceased was aware that she was in a dying condition at the time of making the declarations offered as dying declarations. That case, however, has not been followed, but has been virtually overruled by subsequent cases. In Welbourn's Case, 1 East, P. C. 360, which was an indictment for murder, evidence was admitted of statements as dying declarations. The preliminary question was whether the deceased knew she was dying. It was left to the jury to say, upon the whole evidence, whether they were satisfied that the deceased knew her situation at the time she made the statements. The prisoner was convicted. The case being referred to the judges, they decided by a majority opinion that it did not sufficiently appear that she knew she was in a dying state when she made the statements; "and they all agreed that whether the deceased thought herself in a dying state or not was a matter to be decided by the judge, in order to receive or reject the evidence, and that that point should not be left to the jury." To the same effect is John's Case, 1 East, P. C. 357. See, also, Rex v. Hucks, 1 Starkie, 521, 522, and a note to the same at the end of the case, by Starkie, wherein he says that the decision in Rex v. Woodcock, *ubi supra*, is inconsistent with principle. See, also, Bartlett v. Smith, 11 Mees. & W. 483; Jenkins v. Davies, *ubi supra;* Harris v. Railway Co., 1 Q. B. Div. 515, 533; Reg. v. Hill, 5 Cox, Cr. Cas. 259; Reg. v. Perkins, 2 Moody, Cr. Cas. 135; Carpenter's Co. v. Hayward, 1 Doug. 375; Bull, N. P. 297. The practice in this commonwealth is stated by Morton, C. J., in Com. v. Preece, 140 Mass. 276, 5 N. E. Rep. 494, as follows: "When a confession is offered in evidence, the question whether it is voluntary is to be decided primarily by the presiding justice. If he is satisfied that it is voluntary, it is admissible, otherwise it should be excluded. When there is conflicting testimony, the humane practice in this commonwealth is for the judge, if he decides it is admissible, to instruct the jury that they may consider all the evidence, and that they should exclude the confession if, upon the whole evidence in the case, they are satisfied that it was not the voluntary act of the defendant." In Com. v. Culver, 126 Mass. 464, Lord J., alluding to the practice sometimes followed in a criminal case where an objection to an alleged confession of a defendant is made upon the ground that it was improperly obtained, for the judge to allow the confession, and all the evidence bearing upon the manner in which it was obtained, to be submitted to the jury, either to be rejected wholly by them, or to be allowed such weight as, under all the circumstances, they think proper, says that this is done rather by consent than otherwise, neither party desiring to take the decision of the judge upon the question; but he adds: "The prisoner has always the right to require of the judge a decision of the competency of the evidence; and, even after the judge has decided the evidence to be competent, the prisoner has the right to ask of the jury to disregard and to give no weight to it, because of the circumstances under which the confessions were obtained." And the practice, as thus stated, is well settled in this commonwealth. McManagil v. Ross, 20 Pick. 99; Dole v. Thurlow, 12 Metc. (Mass.) 157; Com. v. Brown, 14 Gray, 419; Com. v. Mullins, 2 Allen, 295; O'Connor v. Hallinan, 103 Mass. 547; Com. v. Coe, 115 Mass. 481; Com. v. Preece, 140 Mass. 276, 5 N. E. Rep. 494; Com. v. Bond, 170 Mass. 41, 48 N. E. Rep. 756, and cases there cited. As to decisions in other States upon the question, see Hughes v. Railway Co., 65 Mich. 10, 31 N. W. Rep. 603; Carter v. State, 63 Ala. 52; People v. McNair, 21 Wend. 608; McGuire v. People, 44 Mich. 286, 6 N. W. Rep. 669; State v. Edwards, 79 N. Car. 648; People v. Linzey, 79 Hun, 23, 29 N. Y. Supp. 560; Flanagin v. State, 25 Ark. 92; Coleman v. Com., 25 Gratt. 865; People v. Bernal, 10 Cal. 66; Simpson v. State, 31 Ind. 90; State v. LeBlanc, 3 Brev. 339; Lester v. State, 37 Fla. 382, 20 South. Rep. 232; Holcomb v. Holcomb, 28 Conn. 177; State v. Whittier, 21 Me. 341; Cook v. Mix, 11 Conn. 432; State v. Scanlan, 58 Mo. 204; Peterson v. State, 47 Ga. 524; Mead v. Harris, 101 Mich. 585, 60 N. W. Rep. 284; Bowdle v. Railway Co., 103 Mich. 272, 61 N. W, Rep. 529.

The rule conduces to the orderly and efficient conduct of a trial. It is also of the gravest importance in a criminal case that the radical question whether the witness understands the nature of an oath should be considered by itself in the first instance, free from any complication with the nature of the evidence he is expected to give, or its bearing upon the issues of the case. When the decision is to be made by a mind so situated as to be in danger of being influenced by the nature of the story as told by the witness, and the importance of the testimony and its bearing one way or the other, it is plain that the decision is not so likely to be upon the real merits of the question as it otherwise would be; and it is easy to see (as, indeed, this very case may perhaps show) that, with the whole case before the jury, there is danger that the question of the competency of a witness may be decided according as his testimony may be legally necessary to sustain a view of the case which the emotions of the jury may lead them to take, if they can find evidence enough to justify them.

Upon principle, and by an overwhelming weight of authority in England and in this country, we are satisfied that when a witness is called and it is objected that by reason of insanity or youthfulness he does not understand the nature of the oath, and is therefore incompetent, it is the duty of the judge to examine into the ques-

tion of his competency, and to reject him unless he is satisfied that he is competent. Against the objection of the prisoner, a different course was taken in this case. The judge was of the opinion that the witness was not competent. It was the right of the prisoner, upon that finding, to have the witness excluded. The verdict should be set aside. Since it is possible that before another trial the witness, by reason of mental development and instruction, general and special, may have sufficient comprehension of the nature and obligation of an oath to satisfy the court that she is a competent witness, we make no further order. Verdict set aside.

NOTE—*Very Recent Cases on the Subject of Competency of Children to Testify as Witnesses.*—It is discretionary with the court to permit a child under the age of 12 years to testify in a criminal case. People v. Smith, 33 N. Y. S. 989, 86 Hun. 485. A boy 13 years of age, who understands the difference between truth and falsehood, comprehends the orthodox idea of future reward and punishment, and knows that it is wrong to swear or tell a lie, is a competent witness. Partin v. State (Tex. Cr. App.), 30 S. W. Rep. 1067. A child under 10 years of age when examined by the court to test her competency, stated that if she swore falsely or did wrong, she would go to hell, but if she did right and told the truth, she would go to Heaven. Held, that the answers were sufficient to show that the witness was competent, though no questions were asked touching her belief in a Supreme Being. Grimes v. State (Ala.), 17 South. Rep. 184. In an action for divorce, it is within the discretion of the court to allow children of the parties, of tender years, to testify. Freeny v. Freeny (Md.), 31 Atl. Rep. 304. An infant under 12 is a competent witness if, in the opinion of the court, she has sufficient intelligence to truthfully narrate the facts to which her attention is directed, though she may be totally ignorant of God and of the evil of testifying falsely. White v. Commonwealth (Ky.), 28 S. W. Rep. 340. On a trial for murder, a boy nearly five and one-half years old, being offered as a witness, stated on his *voir dire* that he knew the difference between the truth and a lie; that if he told a lie, the bad man would get him; that he was going to tell the truth; that his mother had told him that morning to "tell no lie." To the question what would be done with him in court if he told a lie he replied that they would put him in jail, and to a question as to what the clerk said to him when he held up his hand, he answered: "Don't you tell no story." Held, competent. Wheeler v. United States, 159 U. S. 523, 16 S. C. Rep. 93. The decision of the question whether a very young boy has sufficient intelligence to be competent as a witness must rest primarily with the trial judge, and his determination will not be disturbed on review, unless it was clearly erroneous. Wheeler v. United States, 159 U. S. 523, 16 S. C. Rep. 93. A child of sufficient intelligence to have a just appreciation of the difference between right and wrong, and a proper consciousness of the punishment for false swearing, is competent to testify. Williams v. United States, 3 App. D. C. 335. A child 10 years old who, when asked what would become of her when she died if she swore falsely, replied: "I will go to hell," and made the same reply when asked what would be done with her here, was competent to testify. Williams v. State (Ala.), 19 South. Rep. 530. Under Code Civ. Proc. sec. 1880, declaring that children under 10 years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," cannot be witnesses, the determination of the judge as to the competency of such a witness is not reviewable. People v. Craig (Cal.), 44 Pac. Rep. 186. The question of the competency of a child between five and six years old as a witness is one to be determined in each case by the trial judge, and his decision will not be revised except for manifest error. Commonwealth v. Robinson, 165 Mass. 426, 43 N. E. Rep. 121. Rev. St. 1889, sec. 8925, makes a child under 10 years of age who appears incapable of receiving just impressions of the facts, or of relating them truly, incompetent to testify. Held, that it is within the discretion of the court to allow a child under 10 years of age to testify. State v. Nelson (Mo.), 32 S. W. Rep. 809. In a criminal case a boy 15 years old, who states that the oath taken required him to tell what was so, and that what was so was the truth, and what was not so was falsehood, and if he did not tell the truth he would be punished, is a competent witness. State v. Cadotte, 17 Mont. 315, 42 Pac. Rep. 857. A finding of the court that a girl was a competent witness, made only on her appearance, and her answers that she was eight years old, had been to a certain school, understood that, as a witness, she should be bound to tell the truth, and that, if she did not tell the truth, God would punish her, is not reviewable. State v. Sawtelle, 66 N. H. 488, 32 Atl. Rep. 831. A child 10 years old, of natural intelligence, and who understands the nature of an oath, may, in the discretion of the court, be a witness in a criminal case. Territory v. DeGutman (N. M.), 42 Pac. Rep. 88. Whether a boy 11 years old is able to discriminate between right and wrong, and knows the nature of an oath, so as to render him competent as a witness, are questions for the trial court. State v. Reddington (S. D.), 64 N. W. Rep. 170. A boy 10 years of age, having an idea of future rewards and punishments, should also be shown to know the penalties of perjury, in order to render him a competent witness. Murphy v. State (Tex. Cr. App.), 35 S. W. Rep. 174. It was not necessary for the judge to re-examine the prosecutrix to determine her competency as a witness in respect to her youth; an examination for that purpose having been made at a previous trial. People v. Baldwin (Cal.), 49 Pac. Rep. 186. Although a child eight years old, on a preliminary examination for the purpose of testing his competency as a witness, stated that he did not know what an oath was, yet also stated that he knew what it was to "go up in the courthouse and swear you have to tell the truth," that the law would punish him if he told a story, and that he was bound to tell the truth when sworn, and the examination as a whole disclosed such a degree of intelligence and knowledge on the child's part as to satisfy the judge of his competency, a ruling permitting the child to be examined as a witness was proper. Minton v. State (Ga.), 25 S. E. Rep. 626. An examination for the purpose of testing the competency of a child of tender years to testify as a witness, which develops nothing except that he does not know his age, but does know his father's name and the number and names of the days of the week, and can count 32, is not sufficient to authorize a conclusion that he understands the nature of an oath. Gaines v. State (Ga.), 26 S. E. Rep. 760. The admissibility of children under 14 years of age to testify is largely discretionary; and where the child states that she is there to tell the truth, and it is

wrong to tell a falsehood, and she is intelligent, she is competent. Epstein v. Berkowsky, 64 Ill. App. 498. Under 3 How. Ann. St. sec. 7546a, providing that the court may permit a child under 10 years of age to testify when it is satisfied that the child may be safely admitted to testify, where defendant is charged with an assault upon a female child, she be being of the age of 6 years, may make her unsworn statement, where from examination the judge is satisfied, unless it is plain he could not legally reach such a conclusion. People v. Walker (Mich.), 71 N. W. Rep. 641. Error cannot be predicated of allowing a witness eight or ten years old to testify, the court certifying that on his preliminary examination he showed that he understood the obligation of an oath, and was a competent witness, and the bill of exceptions merely showing that he stated that it was wrong to tell a story; and that, if he did, the old buggerman would get him and burn him. Missouri, K. & T. Ry. Co. of Texas v. Johnson (Tex. Civ. App.), 37 S. W. Rep. 771. A witness 6 years and 11 months of age, whom defendant was charged with assaulting, on the *voir dire* did not reveal much knowledge of the nature of an oath or the consequences of falsehood, except that people who told lies would go to jail. Besides, his testimony tended strongly to corroborate his mother's, and he admitted having been under her instructions in regard to his testimony, and a great deal of feeling existed against defendant at the trial. Held, that he should not have been permitted to testify. Donnelly v. Territory (Ariz.), 52 Pac. Rep. 368. A child seven years of age is competent, if possessed of the requisite intelligence and the sense of responsibility to the Supreme Being for false swearing. State v. Washington, 49 La. Ann. 1602, 22 South. Rep. 841. A witness 13 years old is not incompetent, on account of his youth, where he stated that he was aware of the nature and importance of an oath, and was the son of a local magistrate, and familiar with the proceedings in his father's court. Commonwealth v. Wilson, 186 Pa. St. 1, 40 Atl. Rep. 283, 42 W. N. C. 285. It is not error to allow a witness to testify who, though of tender age, is shown to have intelligence sufficient to understand the nature and obligation of an oath. Chapman v. State (Tex. Cr. App.), 42 S. W. Rep. 559. Under Sand. & H. Dig. sec. 2916, subd. 2, providing that infants under the age of 10 years are incompetent to testify, a boy 8 years of age is properly excluded. St. Louis, I. M. & S. Ry. Co. v. Waren (Ark.), 48 S. W. Rep. 222. The competency of a child of tender years as a witness is a question wholly for the court. Hicks v. State (Ga.), 31 S. E. Rep. 579. A child of six, when sworn, stated she did not know what she had done, or understand its meaning, when she held up her hand, but stated she knew it was right to tell the truth, and wrong to tell lies, and that people that told lies were put in jail. Held, that she was a competent witness. Scroggins v. State (Tex. Cr. App.), 51 S. W. Rep. 232.

BOOK REVIEWS.

LAW OF WILLS.

Among the questions which courts are called upon to decide, none perhaps present more difficulties than the law of wills and none probably cause more genuine surprises in their results. Eminent lawyers seem disqualified to make their own wills, and though more successful in making wills for their clients, yet the frequency of the contests show that all the light possible is needed. From a careful examination of the two volumes of Underhill on Wills just received, we are convinced that they will afford the legal profession much aid on this important subject. The author, H. C. Underhill, LL. B., of the New York Bar, has heretofore gained a good reputation as an author by means of his treatises on the Law of Evidence and the Law of Criminal Evidence. The author has divided the rules which he deems compose the main body of the whole system of jurisprudence pertaining to the Law of Wills into two classes: In the first class are comprised rules and maxims of construction and interpretation. In the second are the so called rules of law, in which rules are embraced those legal principles commonly called presumptions of law which have for their basis either an existing state of facts or a fact which is assumed to exist in the particular case. Under the signification of the term "interpretation" are included those rules by which the true meaning of the words which, in the particular case under consideration, the testator has seen fit to use, is ascertained; and by virtue of which, as well, this meaning is so explained to others that they receive from the words the identical ideas which were present in the mind of the testator when he used them. By construction of wills is meant that mental process by which is ascertained, not the meaning of isolated and independent words, but the general plan of the testamentary disposition which is contained in the whole will or in any separate and independent portion of it. Interpretation and construction have, therefore, to do solely with the ascertainment of the intention of the testator. When it shall have been first ascertained that the instrument under consideration is really a will, or whether its writer meant it to operate as a will, and executed by a person having testamentary capacity, then its meaning may be construed. The author has not neglected to discuss all the various questions arising in construing the meaning of the testator, but also whether a will was executed properly in accordance with statutory requirements, and voluntarily without coercion, and by a person having testamentary capacity. It would seem that nothing has been omitted in this treatise and that everything pertaining to wills has been thoroughly discussed under the various headings of Testamentary Power, Conflict of Laws and Domicile, What Writings are Testamentary, Character of Property Devised, Capacity of Beneficiaries to Take under the Will, Testamentary Capacity of Testator, Fraud and Undue Influence, Character and Mode of Execution of Nuncupative Wills, Execution and Attestation of Written Wills, Effect of Re-Execution, Revocation, Lost Wills, Extrinsic Writings, Contracts to Execute Wills, Lapse of Legacies, Survivorship and Substitution, Bequests upon Condition, Tenancy in Common, Children as Purchasers, Illegitimate Children, The Rule in Wild's Case, Gifts to Families, to Relatives, Next of Kin, to Personal Representatives, to Executors, Heirs of the Body, Application of Shelley's Case to Wills, Creation of Estates in Fee, Equitable Conversion, Equitable Elections, Annuities, Trust Estates, Charitable Gifts, Death Without Issue, Future Devises, Perpetuities, Uncertainty of Language, Parol Evidence. The author seems to have done his work thoroughly and neglected nothing in making a complete treatise on the Law of Wills. 17,000 cases are cited. The two volumes are very handsomely bound, mechanically are well done. Published by T. H. Flood & Company, Chicago.

HUMORS OF THE LAW.

Lawyer: You say that you were in the saloon at the time of the assault referred to in the complaint?

Witness: I was, sir.

Lawyer: Did you take cognizance of the bar-keeper at the time?

Witness: I don't know what he called it, but I took what the rest did.

"Look at me!" exclaimed the leading lawyer, warmly. "I never took a drop of medicine in my life. I'm as strong as any two of your patients put together.

"Well, that's nothing!" retorted the physician. "I never went to law in my life, and I'm as rich as any two dozen of your clients put together."

An old negro was recently brought before the court for stealing a rooster. The evidence against him was conclusive, and it looked as if the judge would have to put him on the rock pile. The testimony had all been given when the old negro arose and said: "Mistah Jedge, I stole de roostah in self defense." The court smiled, and told the prisoner to explain: "Hit happun dis away," he continued. "Mysef an' ernuddah culled genulmen wur shootin' craps. He win, fo' he had loaded dice. I bet Tildy's roostah whut she's ben fattin' fo' de meetin' ob de conference. De niggar win dat, tu, an' den, Jedge, he went tu de house an' tole Tildy, an' Tildy, she tuck an' tole me fo' to git ernuddah roostah, er she ur gwine er scald me, an' I stole de roostah. Am not dat self-defense?" The court dismissed him.

The definition of the word "snitch" was settled under oath recently in the Circuit Court of Jackson county, Missouri, at Kansas City, by J. C. Chastine, a negro, formerly a politician. Chastine was a witness for the plaintiff in a suit against the Metropolitan Street Railway Company. Frank P. Walsh, attorney for the road, asked him:

"Joshua, what is your business?"

"I'm connected with the legal department of the firm of Jamison & McVey," replied Chastine.

"What are you? One of those ambulance chasers who rush after a man who is hurt and offer the services of a lawyer to bring suit for damages? is that your business?"

"No. I'm no snitch."

"What's that?"

"I say I'm no snitch."

"Snitch?"

"Yes, snitch."

"Spell snitch."

"S n i t c h, snitch."

"What is a snitch?"

"Why, all the damage suit lawyers have snitches. A snitch is a fellow that watches for people to get hurt, and gets 'em as soon as he can and makes a contract to sue the company for damages."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADVERSE POSSESSION — Title — Color of Title.—A deed of part of the homestead of a married man, executed by him alone, being a nullity, does not constitute "title or color of title," within Rev. St. art. 3341, requiring title and color of title, under which three years' adverse possession becomes a bar to a suit to recover real estate, to be in accordance with "intrinsic fairness and honesty."—WATSON v. WATSON, Tex., 55 S. W. Rep. 183.

2. ADVERSE POSSESSION—Void Tax Title.—A claimant under a void tax deed cannot acquire a title by adverse possession, as against the holder of the legal title, otherwise than by actual adverse possession.—WOOLFOLK v. BUCKNER, Ark., 55 S. W. Rep. 168.

3. APPEAL—Bill of Exceptions—Time of Filing.—Where an appeal was taken on April 25th, and 90 days given in which to file a bill of exceptions, the bill filed on July 25th was one day too late, excluding the first day in computing the time in which the act is to be done, as required by Rev. St. § 6570.—GRAHAM v. DE GUIRE, Mo., 55 S. W. Rep. 151.

4. APPEAL—Supreme Court—Jurisdiction.—On an appeal from the court of appeals to the supreme court under Const. art. 6, § 12, giving an appeal in cases involving the construction of the constitution of the United States or the State of Missouri, an appeal will lie only when it plainly appears on the face of the record that the question of a particular construction thereof was raised, passed on, and the ruling thereon excepted to by the losing party in the trial court.—VANSANT v. HOBBS, Mo., 55 S. W. Rep. 147.

5. ATTACHMENT—Forthcoming Bond.—An attaching creditor's complaint to recover its judgment against the debtor from a subsequent attaching creditor, alleging that after the debtor gave a forthcoming bond, and the property was delivered to him, defendant caused an attachment to be levied on the same property, which it caused to be sold under an execution against the debtor, and that defendant received the proceeds, and applied them to his judgment, and that the giving of forthcoming bond and delivery of the property was not a waiver of plaintiff's attachment lien on the property, but failing to state whether

plaintiff's attachment was traversed or not, and, if so, that it was sustained, is insufficient.—HALLACK PAINT, OIL & GLASS CO. v. DENVER NAT. BANK, Colo., 59 Pac. Rep. 964.

6. ATTACHMENT—Lien — Delivery Bond.—Code, §§ 111, 112, provide that the proceeds of sales and money collected by the sheriff, and all property attached remaining in his hands, shall be released from the attachment, and delivered to defendant on defendant's giving a bond to plaintiff conditioned that if he recovers judgment, and the attachment is sustained, the defendant will redeliver the property to the officer, and in default thereof the defendant will pay its full value to plaintiff. Held, that the lien of an attachment does not continue against attached property delivered to defendant after the execution of such bond, and a subsequent incumbrancer, having only constructive notice of the levy, takes unaffected by the attachment.—NICHOLS v. CHITTENDEN, Colo., 59 Pac. Rep. 954.

7. BAILMENT—Insolvent Bailee.—Where the owner of notes placed the same in the hands of another for collection, and the bailee, having made collections, failed to remit the proceeds, the claim of the owner of the money collected was, in a general sense, in the nature of a fiduciary debt, but not such a one as entitled him to a priority over the claims of general creditors in the distribution of the assets of the bailee, who had become insolvent.—TIEDMAN v. IMPERIAL FERTILIZER CO., Ga., 34 S. E. Rep. 999.

8. BANKRUPTCY — Creditors' Suit—Equitable Lien.—Where a creditor of an insolvent acquires an equitable lien on his assets by filing a creditors' bill before bankruptcy proceedings were begun by the debtor, the trustee in bankruptcy took the property subject to such lien.—TAYLOR v. TAYLOR, N. J., 45 Atl. Rep. 440.

9. BANKRUPTCY—Discharge.—Although the only debt scheduled against the estate of a bankrupt is a judgment of a State court in an action against him for criminal conversation, the court of bankruptcy has jurisdiction of his application for discharge, and will grant him a discharge if he is otherwise entitled to it, without any final determination of the question of the effect of the discharge on such judgment.—IN RE TINKER, U. S. D. C., S. D. (N. Y.), 99 Fed. Rep. 79.

10. BANKRUPTCY—Jurisdiction — Pendency of Insolvency Proceedings.—The pendency of proceedings in insolvency under a State law, on the debtor's voluntary petition, begun before the passage of the bankruptcy act, will not be ground for dismissing the debtor's subsequent voluntary petition in bankruptcy, although he has contracted no new debts, when it appears that one or more of the creditors scheduled by the bankrupt are citizens of States other than that in which the insolvency proceedings were instituted.—IN RE MUSSEY, U. S. D. C., D. (Mass.), 99 Fed. Rep. 71.

11. BANKRUPTCY—Jurisdiction in Partnership Cases.—A petition in involuntary bankruptcy against a partnership, alleging that, during the greater part of the preceding six months, the several partners had their respective domiciles within the district where the petition is filed, will be dismissed on motion of the respondents, unless amended on leave, where it is shown that none of the members of the firm had his domicile or resided within the district long enough to support the jurisdiction of the court.—IN RE BLAIR, U. S. D. C., S. D. (N. Y.), 99 Fed. Rep. 76.

12. BANKRUPTCY — Proof of Debt.—Where the State law gives a remedy for the collection of debts fraudulently contracted, by the arrest of the debtor, proof of a claim against the estate of a bankrupt for goods sold and delivered will not prejudice the right of the creditor to proceed against him by suit in the State courts on a complaint alleging that the sale of the goods was procured by the false representations of the defendant.—IN RE LEWENSOHN, U. S. D. C., S. D. (N. Y.), 99 Fed. Rep. 73.

13. BANKRUPTCY — Suits Against Trustee — Jurisdiction.—A circuit court, or other court of equity, has jurisdiction of a suit against a trustee in bankruptcy to establish the validity and lien of a pledge made by the bankrupt of property which has come into the hands of the trustee.—CHATTANOOGA NAT. BANK v. ROME IRON CO., U. S. C. C., N. D. (Ga.), 99 Fed. Rep. 82.

14. BANKS—Public Moneys—Deposit.—Public moneys deposited in a bank in violation of law are trust funds, do not become the property or assets of such bank, and remain trust funds, with title in the true owner, after the appointment of a receiver and insolvency of the bank.—FIRST NAT. BANK OF POCATELLO v. C. BUNTING & CO., Idaho, 59 Pac. Rep. 929.

15. BILLS AND NOTES — Negotiable Instrument.—An obligation to pay money, containing stipulations that may render it non-negotiable, according to the law merchant, is made negotiable, under the statute (section 1073, Rev. St.), to the extent of having the entire interest therein transferred by assignment or indorsement, and of authorizing the assignee or indorsee to sue thereon in his own name.—BIRMINGHAM TRUST & SAV. CO. v. JACKSON CO. MILL CO., Fla., 27 South. Rep. 43.

16. BILLS AND NOTES — Rights of Transferee — Bona Fide Holder.—The transfer of negotiable obligations as security for an antecedent debt is as much in the usual course of business as their transfer in payment of a debt, and in neither case is the *bona fide* holder affected by equities between prior parties of which he had no notice.—HAMILTON v. FOWLER, U. S. C. C. of App., Sixth Circuit, 99 Fed. Rep. 17.

17. BILLS AND NOTES—Transfer—Consideration.—Negotiable bonds, taken before their maturity, in the usual course of business, as security for an antecedent debt, are taken for a valuable consideration, whether such debt was payable at the time the security was given or not.—ROCKVILLE NAT. BANK v. CITIZENS' GAS-LIGHT CO., Conn., 45 Atl. Rep. 861.

18. CARRIERS — Free Transportation.—The statute (chapter 167, Laws 1897), being "An act to require railroad companies to furnish free transportation to shippers of stock in certain cases," etc., is a deprivation of property without due process of law, and a denial of the equal protection of the laws, and is therefore unconstitutional and void, under the fourteenth amendment to the federal constitution.—ATCHISON, ETC. RY. CO. v. CAMPBELL, Kan., 59 Pac. Rep. 1051.

19. CARRIERS — Passengers — Negligence.—Where a passenger left her train, and boarded another, at a meeting point, to converse with her sister, she cannot recover for injuries sustained in leaving the latter train, in the absence of proof that the employees operating such train knew of her presence, and that it was only temporary.—BULLOCK v. HOUSTON, ETC., RY. CO., Tex., 55 S. W. Rep. 184.

20. CARRIERS OF LIVE STOCK — Consignment—Loss of Sale.—Unless a carrier is informed that a consignment of live stock has been contracted to be sold, and that, to effect the sale, it is necessary that they should be delivered at their destination by a certain time, it is not liable for special damages occasioned by the loss of the sale.—INTERNATIONAL, ETC. R. CO. v. HATCHELL, Tex., 55 S. W. Rep. 186.

21. CHATTEL MORTGAGE — Error in Description. — Where the parties to a chattel mortgage by mistake execute the same upon wheat and straw grown and being upon a certain tract of land, when in fact it was grown and situated upon another tract of land, the mistake may be corrected by the voluntary delivery of the property by the mortgagor to the possession of the mortgagee before any specific rights or liens of other persons have been acquired.—TRICE v. MYTON, Kan., 59 Pac. Rep. 1090.

22. CONSTITUTIONAL LAW—Carrying Weapons.—The provisions of article 45, ch. 25, St. 1893, in reference to carrying weapons, are not in conflict with any constitutional provision or organic law, and are therefore valid, and may be enforced against all persons violating their inhibitions.—WALBURN v. TERRITORY, Okla., 59 Pac. Rep. 972.

23. CONSTITUTIONAL LAW—Diseased Sheep—Quarantine.—An act of the Idaho legislature establishing quarantine against diseased sheep, etc., passed on March 13, 1899, held not to be in contravention of section 8, art. 1, or section 2, art. 4, of the constitution of the United States.—STATE v. RASMUSSEN, Idaho, 59 Pac. Rep. 933.

24. CONSTITUTIONAL LAW—Municipal Ordinance.—A city ordinance requiring a resident sales agent for nonresident principals to pay a license tax for the privilege of prosecuting his business, confined exclusively to the negotiation of sales by the exhibition of samples of goods which are in other States, is a regulation of interstate commerce, and therefore void, as repugnant to Const. U. S. art. 1, § 8, cl. 3, giving congress the power to regulate commerce among the several States. ADKINS v. CITY OF RICHMOND, Va., 34 S. E. Rep. 967.

25. CONTRACT—Consideration.—Where, on the declaration of defendant that it would not perform its contract to deliver to plaintiff certain quantities of steel, of specified kinds, at stated prices, they entered into a new contract, reciting the cancellation of the old contract, and acceptance in lieu thereof of an agreement to furnish certain other amounts of other kinds of steel, there is a consideration for the new contract, and a compromise of the old one.—DREIFUS v. COLUMBIAN EXPOSITION SALVAGE CO., Penn., 45 Atl. Rep. 370.

26. CONTRACTS — Construction. — An agreement between the owner of a trade-mark and the manufacturer of articles covered thereby provided for payment to the owner of the trade-mark of a royalty of one-half of the net profits. Held, that statements rendered by the manufacturer under this contract were not available to his assignee, as showing a construction of the contract by the parties themselves, where it appeared that the assignee knew nothing of the statement until offered in evidence by the owner of the trade-mark in an action for accounting as to profits.—MILLER v. BILLINGTON, Penn., 45 Atl. Rep. 372.

27. CONTRACTS — Evidence. — Where findings of fact showed that plaintiffs had contracted to build a church for defendant, and that there was due on said contract, and for extra work, a certain sum, together with attorney's fees, less certain payments and deductions which were found for defendant, conclusions of law correctly stating the aggregate of such amounts, as the amount plaintiff was entitled to recover and defendant was to be credited with, were proper.—BIRD v. RECTOR, ETC., OF ST. JOHN'S EPISCOPAL CHURCH OF ELKHART, Ind., 56 N. E. Rep. 129.

28. CONTRACTS—Interpretation—Law of Place.—An agreement made by citizens of this State to indemnify a citizen of another State for advances of money made by him to another citizen of the latter State, to enable the last-mentioned citizen to prosecute certain work in that State, is a contract of the latter State; that is, a contract to be performed in that State, and, therefore, as to its interpretation and effect, is governed by the laws of such latter State.—ALEXANDRIA, A. & FT. S. R. CO. v. JOHNSON, Kan., 59 Pac. Rep. 1063.

29. CONTRACT—Ratification.—A person may become bound by a contract which another, without authority, has assumed to make in his name, by knowingly accepting its benefits, or by failing to repudiate it after he has full knowledge of all the facts.—GERMAN INS. CO. OF FREEPORT, ILL., v. EMPORIA MUT. LOAN AND SAVINGS ASSN., Kan., 59 Pac. Rep. 1093.

30. CONTRACTS — Validity — Consideration. — The deposit of money in a bank, and the issuance of a certificate payable to the depositor, or in case of her death, to another, do not, where there is no consideration therefor, constitute a valid contract between the depositor and the bank for the benefit of the other, which the latter can enforce on the depositor's death before the sum is withdrawn.—SULLIVAN v. SULLIVAN, N. Y., 56 N. E. Rep. 116.

31. CONTRACT FOR FURNACES—Action for Price.—Contract to put in furnaces, merely guarantying that there should be a certain saving in cost of fuel, and being silent as to how the saving should be ascertained, evidence of a contemporaneous verbal understanding that there should be a test of a certain kind is admissible, it not interfering with the writing.—HAWLEY DOWN-DRAFT FURNACE CO. v. HOOPER, Md., 45 Atl. Rep. 456.

32. CORPORATION—Action on Notes.—A corporation was sued upon promissory notes. The notes were executed in the corporate name by one signing himself as "business manager," an officer of corporations unknown to the law, and of whose authority to execute notes for corporations the courts cannot know or presume anything. The petition, however, alleged that the notes "were made, executed, and delivered by the corporation." Held, this was a sufficient allegation of authority in the one signing them as "business manager" of the corporation.—TOPEKA CAPITAL CO. v. REMINGTON PAPER CO., Kan., 59 Pac. Rep. 1062.

33. CORPORATIONS—Exempt from Taxation.—An act supplemental to the charter of a corporation, granting it partial exemption from taxation, having been passed after adoption of Const. 1851, art. 3 § 47, touching the formation of corporations, and providing that all laws passed in pursuance thereof should be subject to alteration or repeal, can be repealed, though it is in form irrepealable, and has a sufficient consideration to make it such, but for the constitutional provision.—STATE v. NORTHERN CENT. RY. CO., Md., 45 Atl. Rep. 465.

34. CORPORATION—Insolvent Corporation — Parties.—A trustee holding securities of a corporation, deposited to secure its outstanding bonds, is a proper party to a suit in equity to wind up the corporation as insolvent.—MILES v. NEW SOUTH BUILDING & LOAN ASSN. (AMERICAN TRUST & BANKING CO.), U. S. C. C., N. D. (Ga.), 99 Fed. Rep. 4.

35. COURTS—Concurrent Jurisdiction.—As a general rule, a court which first acquires the custody and control of property and assets by the appointment of a receiver will retain such control until the end of the litigation, to the exclusion of interference by other courts of concurrent jurisdiction.—MISSOURI PAC. RY. CO. v. LOVE, Kan., 59 Pac. Rep. 1072.

36. CREDITORS' BILL—Recovery—Assets—Parties.—A creditors' bill, alleging that the debtor agreed with creditors for the appointment of a committee who should direct a trustee of his property to make such sales, conveyances, etc., as it might direct, and that such committee preferred themselves and others in the distribution of the property, and praying a refunding of such part of the assets to the trustee in excess to a pro rata distribution among all the creditors, is insufficient for failure to make such trustee a party, since, being the custodian of the property, it was necessary that it be made a party to enable the court to make a complete determination of the suit. — DOBBINS v. COLE, N. J., 45 Atl. Rep. 442.

37. CRIMINAL EVIDENCE—Confessions.—The rule of law demands that the confession of an accused shall have been made voluntarily, and without the appliance of hope or fear by any other person; and that the law cannot measure the force of the influence, or decide upon its effect upon the mind of the accused, and therefore excludes the declaration if any degree of influence has been exerted. The proof must show that the making of the statement was voluntary.—STATE v. YOUNG, La., 27 South. Rep. 51.

38. CRIMINAL LAW — Bribery — Indictment. — To corruptly offer money to a legislator, as an inducement to vote for a candidate for United States senator, is bribery at common law.—STATE v. DAVIS, Del., 45 Atl. Rep. 394.

39. CRIMINAL LAW — Defense — Alibi.—The burden of proof is not shifted by the defense of an alibi, and defendant cannot be convicted if the evidence raises a reasonable doubt of his presence at the time and place where the crime was committed.—STATE v. MCLELLAN, Mont., 59 Pac. Rep. 924.

40. CRIMINAL LAW — Embezzlement — Identifying Funds.—Where plaintiffs had G, their employee, sell their notes, and deposit the proceeds in bank to his own account, with his own money, he to pay them, from time to time, such amounts from his bank account as their needs might call for, up to the amount so received by him, it is not embezzlement or theft for him to use for his own purposes part of such funds.—YOUNG v. GLENDENNING, Penn., 45 Atl. Rep. 364.

41. CRIMINAL LAW—Forgery—Indictment.—Since under Code, §§ 4719, 4720, defining the several degrees of forgery, the forgery of a check is not forgery in the first degree, unless the check be drawn on an incorporated bank or banking company, an indictment for forging a check, which does not aver that the drawee of the check is an incorporated bank, charges only forgery in the second degree, and a finding that defendant is "guilty as charged in the indictment" finds him guilty only of forgery in the second degree.—BENSON v. STATE, Ala., 27 South. Rep. 1.

42. CRIMINAL LAW — Former Jeopardy.—An accused person cannot set up former jeopardy upon an accusation which was quashed on a demurrer filed by himself, and this is true though the judge, at the time the demurrer was submitted, overruled it, and allowed the case to proceed to the extent of introducing testimony, but afterwards recalled his original ruling, and adjudged that the demurrer was good, and the accusation insufficient in law.—BROWN v. STATE, Ga., 34 S. E. Rep. 1031.

43. CRIMINAL LAW—Homicide — Insanity.—Insanity, in order to constitute a defense to homicide, must be such as utterly to deprive the party of his reason in regard to the act committed.—STATE v. COLE, Del., 45 Atl. Rep. 391.

44. CRIMINAL LAW—Homicide — Self-Defense.—Upon the trial of a person charged with the offense of murder, where the defense set up is that the accused was a member of the posse of an arresting officer, and that when he killed the deceased he was acting under the fears of a reasonable man that his life was in danger, a charge that in order for such fears to justify the killing they must have been the fears "of a reasonably courageous man,—not the fears of a coward, but the fears of a brave man, who wants to do his duty, and is trying to do it,"—will not be held sufficient cause for ordering a new trial.—DOVER v. STATE, Ga., 34 S. E. Rep. 1030.

45. CRIMINAL LAW—Practice.—Counsel for the prosecution in a criminal case are not bound to introduce all the witnesses whose names are indorsed upon the indictment, and who are shown by the State's evidence to have witnessed the commission of the offense.—ALVAREZ v. STATE, Fla., 27 South. Rep. 40.

46. CRIMINAL LAW — Witness — Impeachment.—Though, in a criminal case, where the prosecution calls a witness who proves hostile, the district attorney may, in a proper case and in a proper manner, prove a contradictory statement made by him on a former occasion, it should not be received as substantive, independent, and criminative evidence of the fact stated therein against the accused, but only as *rem ipsam*, and to affect the credibility of the witness himself.—STATE v. ROBINSON, La., 27 South. Rep. 124.

47. DAMAGES—Measure of Damages.—Plaintiff below sought to recover damages for injuries to his real property, caused by the destruction of certain shade trees, shrubbery, and grass growing thereon. Held, that under the facts of the case the proper measure of damages was the fair market value of the property immediately before and immediately after the injury complained of.—WICHITA GAS, ELEC. LIGHT & POWER CO. v. WRIGHT, Kan., 59 Pac. Rep. 1085.

48. DEATH BY WRONGFUL ACT—Recovery.—Under Gen. St. 1887, §§ 1008, 1009, providing that causes of action for injury to the person of a decedent, whether the same results in instantaneous death or otherwise, shall survive to his personal representative, who may recover damages not exceeding $5,000, an administrator was entitled to recover substantial damages for his intestate's instantaneous death, occurring through defendant's negligence.—BROUGHEL v. SOUTHERN NEW ENGLAND TEL. CO., Conn., 45 Atl. Rep. 435.

49. DEEDS — Construction — Description.—A deed which recited that it conveyed to the grantee "all the following portions of the said homestead farm," followed by a description of a tract not included in such homestead farm, does not operate to convey such last-described tract.—WHITNEY v. BICKFORD, N. H., 45 Atl. Rep. 412.

50. DEED—Estate Conveyed.—A deed conveying land to the grantor's daughter and her husband, though by the premises conveying to them a fee-simple in the lots, so that, standing alone, they would take by entireties, and, he surviving his wife, the entire estate would survive to him, is qualified by the *habendum*, so that he takes but a life estate; it providing, "to have and to hold unto the said H and M, his wife, their heirs and assigns, to and for the only proper use and behoof of the said H, during the term of his natural life, with the remainder to the said M, his wife, her heirs and assigns, forever."—BEDFORD LODGE, I. O. O. F., NO. 202, v. LENTZ, Penn., 45 Atl. Rep. 378.

51. DEED — Partition.—A written instrument examined, and held to be a deed, and not testamentary in character. The owner of a life interest in lands cannot maintain an action of partition against the owners of the estate in remainder. A decree in such case, setting over a part of the property to the plaintiff (a life tenant) in fee-simple, is wholly void.—LOVE v. BLAUW, Kan., 59 Pac. Rep. 1059.

52. EMINENT DAMAIN — Damages.—Owners of realty abutting upon an existing public road are not entitled to damages alleged to have been occasioned by the establishment of a new public road which does not touch their premises, and this is true though the order for laying out the new road may have been granted upon an application for an alteration of an old road, if, as matter of fact, the portion of the latter running by or through the property of such owners is, by the express terms of such order, left open, and provision is therein made for keeping the same in repair.—HUFF v. DONEHOO, Ga., 34 S. E. Rep. 1035.

53. ESTOPPEL IN PAIS.—Where M erected a building partly on her land, and extended it over an alley, and into and against the house of R, which was 2 1-2 feet inside of his lot line, he is estopped to maintain ejectment for such 2 1-2 feet, he having lived in his house while the other was being erected, and having known all the facts, and because he thought that some day M, who was his sister, would give the property to his children, having made no objection till five years after, when he learned she was going to sell the property.—REDMOND v. EXCELSIOR SAV. FUND & LOAN ASSN., Penn., 45 Atl. Rep. 422.

54. EVIDENCE—Declarations—Res Gestæ.—Where the *res gestæ* in an action for damages for personal injuries are the facts and circumstances under which the plaintiff left a car of the defendant company, his declarations relative thereto, not made spontaneously and instinctively, under the immediate pressure of the occurrence, but deliberately, in answer to questions as to how the accident occurred, propounded to him out of the presence of any one who was an actor in the transaction, and a considerable time after it had become an accomplished fact, and the conductor and his train were miles away, are not admissible in evidence as part of such *res gestæ*.—MARLER v. TEXAS PAC. RY. CO., La., 27 South. Rep. 176.

55. EVIDENCE — Parol Evidence.—Parol testimony is admissible for the purpose of showing whether undeclared dividends passed to the purchaser of shares of stock in a corporation, but its effect must be restricted to the parties to the transaction.—RIVERS v. OAK LAWN SUGAR CO., La., 27 South. Rep. 118.

56. EXECUTION — Alias Execution — Sale.—An execution was levied upon land which was appraised and

advertised for sale by the sheriff. Further proceedings under the writ were enjoined by the judgment debtor, and return of the process made by the officer, reciting the facts. The defendant in the execution then died, and the injunction suit was dismissed. Immediately, and without revivor, an alias execution was issued, reciting the steps taken under the first one, and the land advertised and sold thereunder. Held, that the alias execution, under the statute, performed the office of a *venditioni exponas* at common law, and that a sale made under it was valid.—RAIN v. YOUNG, Kan., 59 Pac. Rep. 1068.

57. FALSE IMPRISONMENT — Liability of Sheriff.—The duties assigned to a sheriff are delicate and difficult, and his responsibilities are great; and, in the absence of proof having a tendency to show a wanton abuse of authority, it is right that a court should hold an action for damages not maintainable against him, on the ground that he had probable cause to make the plaintiff's arrest, notwithstanding it be shown to have been a clear case of mistaken identity.—WELLS v. JOHNSTON, La., 27 South. Rep. 185.

58. FEDERAL COURTS—Jurisdiction.—An action for treble the amount lost at gambling,—one-half thereof to go to the person bringing the action, and the other half to the county,—authorized by 1 Starr & C. Ann. St. Ill. 1885, p. 792, ch. 38, § 132, to be brought against the winner by any person in case the loser fails to sue for his losses, is for a penalty, and cannot be taken jurisdiction of by a federal court, though the money lost belonged to plaintiff, and had been surreptitiously taken by the loser.—STICHTENOTH v. CENT. STOCK & GRAIN EXCH. OF CHICAGO, U. S. C. C., N. D. (Ill.), 99 Fed. Rep. 1.

59. FRAUDULENT CONVEYANCES — Fraud—Knowledge of Trustee.—Where a debtor transferred her property to a trustee, to secure and prefer one of her creditors, and to hinder others in the collection of their claims, and the trustee and the preferred creditor knew of such purpose, and that such would be the effect of the transfer, but acted only to secure the preference, the transfer was not void as to the other creditors.—CROTHERS v. BUSCH, Mo., 55 S. W. Rep. 149.

60. GUARANTY—Failure to Sue Principal.—A complainant in an action on a guaranty of a mortgage bond, who fails to show that within a reasonable time after the accrual of his right to collect the debt guarantied he sought to collect from the debtors or the mortgaged premises, or that such a course would have been idle, is properly nonsuited.—DUTTON v. PYLE, Penn., 45 Atl. Rep. 429.

61. GUARDIAN AND WARD—Equity — Laches.—Since Code Civ. Proc. § 1679, providing that a guardian of an infant party to the action shall not purchase, or be interested in the purchase of, the property sold, refers only to a guardian *ad litem* appointed by the court, it does not prohibit a guarding *in socage*, having the custody of her infant children's interest as heirs in land in which she also had a dower interest, from purchasing the land at foreclosure sale, and taking a deed thereof.—BOYER v. EAST, N. Y., 56 N. E. Rep. 114.

62. HIGHWAY — Bridges. — Where the construction of defendant's work made it necessary that a bridge be erected on a public highway, the fact that the bridge was erected by lawful authority, and was on the public highway, and used by the public, did not exempt defendant from liability for its maintenance and repair, since defendant erected the bridge primarily for its own benefit.—CHESAPEAKE & O. RY. v. JENNINGS, Va., 34 S. E. Rep. 986.

63. HOMESTEAD — Exemption.—"A purchase of a homestead with a view to occupancy, followed by occupancy within a reasonable time, receives from the time of purchase a homestead exemption from seizure upon execution or attachment."—EVANS v. CARSON, Kan., 59 Pac. Rep. 1091.

64. HUSBAND AND WIFE — Separation Agreement — Rescission.—An agreement was made between a husband and wife, in contemplation of a separation, by which the wife, in consideration of $1,000, agreed to relinquish all claims upon the husband and his estate for her support. No express fraud or duress was practiced upon the wife, but it appeared that she executed the agreement unadvisedly, and as the result of ill treatment; and the provision for her support was entirely inadequate, and not equitable, considering the husband's means. Held, that a judgment setting aside the agreement, upon the wife restoring to the husband that part of the consideration which she had not expended, should be affirmed.—HUNGERFORD v. HUNGERFORD, N. Y., 56 N. E. Rep. 117.

65. HUSBAND AND WIFE — Wife's Capacity to Contract.—Under Code, § 2288, conferring on a married woman the right to make contracts in respect to her separate estate, a married woman having no separate estate is incapable of contracting.—HIRTH v. HIRTH, Va., 34 S. E. Rep. 964.

66. INJUNCTION—Right of Mortgagee.—Plaintiff's bill and testimony furnishing ground for an injunction on the ground of threatened injury to land on which plaintiff has a mortgage, by use of the clay for making bricks, the bill should not be dismissed by reason of the averments of defendant's answer, and his assurance, through his counsel, that he has "no intention of doing that of which the bill complains," but should be retained, with leave to plaintiff to move for an injunction on defendant's disregarding his avowed intentions.—REAL ESTATE TRUST CO. OF PHILADELPHIA v. HATTON, Pa., 45 Atl. Rep. 379.

67. INSURANCE AGENTS — Authority.—An insurance company, like an individual, may limit the authority of its agents; and where direct notice of such limitation, or any notice which a prudent man is bound to regard, is brought home to the assured, he is bound by it, and relies upon any act in excess of such limited authority at his peril.—MURPHY v. ROYAL INS. CO. OF LIVERPOOL, La., 27 South. Rep. 143.

68. JOINT DEFENDANTS.—The obligation of two or more persons who intervene in an act of sale to a corporation, and give their personal guaranty that for a period of years its shares of preferred stock shall annually earn and pay a dividend of 10 per cent., is joint as to the obligors, and not *in solido*.—HORNOR v. MCDONALD, La., 27 South. Rep. 91.

69. JUDGMENT—Foreclosure—Corporation—Collusive Judgment.—A judgment against a corporation is not collusive in the legal sense, so as to prevent its nonpayment from constituting a default for which a mortgage debt may be declared due under a provision of the mortgage, merely because the action was undertaken for the purpose of creating such default, if it was brought for a debt that was due, and was properly conducted.—HARRY W. DICKERMAN v. NORTHERN TRUST COMPANY, U. S. S. C., 20 Sup. Ct. Rep. 311.

70. JUDGMENT — Res Judicata.—A judgment in partition decreeing defendant entitled to plaintiff's share of the property under a deed by defendant to plaintiff, the validity of which was not then in issue, was not *res judicata* against plaintiff's right in a subsequent action to set aside the deed on the ground that it was made without consideration, and with the understanding that defendant would reconvey the property to plaintiff on request.—EAVES v. VIAL, Va., 34 S. E. Rep. 978.

71. JUDGMENT — Res Judicata.—A demand will be held to be *res adjudicata*, where by a former decree or judgment the same claim, based upon the same muniment of title, between the same parties, touching the same subject-matter, has been determined by a competent court.—WOOSTER v. COOPER, N. J., 45 Atl. Rep. 381.

72. LANDLORD AND TENANT—Verbal Lease.—A verbal contract of lease, complete in itself, independent of any writing, and unaccompanied by an intention to have the same reduced to writing, as perfecting it, is an enforceable contract.—LAROUSSINI v. WERLEIN, La., 27 South. Rep. 89.

73. LIBEL — Privileged Communication.—Where the officers of a church, upon inquiry, find that their pastor is unworthy and unfit for his office, and thereupon, in the performance of what they honestly believe to be their duty towards other members and churches of the same denomination, publish, in good faith, in the church papers, the result of their inquiry, and there is a reasonable occasion for such publication, it will be deemed to be privileged and protected under the law.—REDGATE V. ROESH, Kan., 59 Pac. Rep. 1050.

74. LIFE INSURANCE — Assignment of Policy—Insurable Interest.—A creditor, to whom his debtor has assigned policies of insurance on his life as collateral, does not cease to have an insurable interest in such life by reason of his accepting the benefits of a general assignment made by the debtor conditioned that all creditors participating shall accept the dividends paid in full satisfaction of their debts, where his claim is not in fact paid in full, as, even if the transaction operates as a legal discharge of the debt, the moral and equitable obligation to pay the remainder still rests upon the debtor, and is sufficient to give the creditor an insurable interest in his life.—MANHATTAN LIFE INS. CO. V. HENNESSY, U. S. C. C. App., Fifth Circuit, 99 Fed. Rep. 64.

75. LIFE INSURANCE — Warranty — Compliance. — A warranty stipulated in a contract of life insurance must be strictly complied with, or literally fulfilled, before the insured is entitled to recover on the policy. A warranty need not be material to the risk, because it is of itself an implied agreement that the representations warranted are material.—PETITPAIN V. MUTUAL RESERVE FUND LIFE ASSN., La., 27 South. Rep. 113.

76. LIMITATION OF ACTIONS — Part Payment — New Promise.—Defendant, after refusing under threat of suit, to pay his note, against which limitations had run, permitted plaintiff to take for application on the note an amount of wood at an exorbitant price. The amount was credited on the note and defendant did not expect payment otherwise than by such credit. Held, that, since the facts were not inconsistent with the implication of a new promise, the referee's finding of a new promise was conclusive, and an action brought within six years of such promise was not barred.—ENGEL V. BROWN, N. H., 45 Atl. Rep. 402.

77. LIMITATION OF ACTIONS—Principal and Surety.—Under Code Civ. Proc. § 359, providing that actions against a stockholder of a corporation, to enforce statutory liability, must be brought within three years after the liability is created, limitations begin to run, as against the demand of a surety who has been compelled to pay the debt of the corporation, from the day of such payment, and not from the date of the original obligation.—RYLAND V. COMMERCIAL & SAVINGS BANK OF SAN JOSE, Cal., 59 Pac. Pep. 989.

78. MANDAMUS — Foreign Corporations. — Laws 25th Leg. p. 192, subd. 56, requires the secretary of state to issue permits to foreign corporations only on proof of subcription of 50 per cent. of their authorized capital. Held, that the secretary of state could not be compelled by *mandamus* to issue a certificate authorizing a foreign corporation which had not complied with such act to do business within the State.—ENGLISH & SCOTTISH AMERICAN MORT. & INV. CO. V. HARDY, Tex, 55 S. W. Rep. 169.

79. MANDAMUS TO COURT—Dissolution of Injunction.—A *mandamus* will not issue to compel a court to hear a motion to dissolve or modify an interlocutory injunction granted on order to show cause, based on the discovery of additional evidence tending to establish facts alleged in opposition to the injunction, unless the privilege of applying for such dissolution or modification was reserved in the order granting the injunction; such hearing being in the discretion of the court.—HICKEY V. DISTRICT COURT OF SECOND JUDICIAL DISTRICT, Mont., 59 Pac. Rep. 917.

80. MARRIAGE—Breach of Promise—Statute of Frauds.—A contract to marry is not within the statute of frauds, requiring "any agreement" not to be performed within a year to be in writing.—LEWIS V. TAPMAN, Md., 45 Atl. Rep. 459.

81. MARRIAGE—Presumptions — Evidence.—The presumption of a common-law marriage from the fact of cohabitation and reputation is overcome by evidence that the parties separated; that the woman assumed her maiden name, declared she was a single woman, was introduced as such, neither received nor requested aid from the man, and ceased all communication with him; and that the man, within two years after she deserted him, duly solemnized a marriage with another woman; for it shows that the parties did not regard themselves as husband and wife, but that their relations were merely meretricious.—IN RE MAHER'S ESTATE, Ill., 56 N. E. Rep. 125.

82. MARRIED WOMEN — Conveyances.—A married woman was made a free dealer by decree of a chancery court in the State of Alabama, under section 2731 of the Code of 1876, which did not authorize her to be made a free dealer with general powers to contract as a *feme sole*, but only in reference to her statutory and other separate estate, to the extent mentioned in the statute, and no further. She subsequently moved to this State, acquired separate statutory real estate, and engaged in the mercantile business of buying and selling goods. Held, that she did not acquire the *status* of a free dealer under the laws of this State by virtue of the decree made in the State of Alabama, and that a bill in equity was proper to subject her separate statutory property to the payment of debts contracted by her for goods used in her mercantile business.—WALLING V. CHRISTIAN & CRAFT GROCERY CO., Fla., 27 South. Rep. 46.

83. MASTER AND SERVANT—Negligence of Fellow-Servants.—If the negligence of a master contributed to an injury to his servant, it is no defense to an action against him therefor that fellow-servants were also guilty of negligence which contributed thereto.—MAUPIN V. TEXAS & P. RY. CO., U. S. C. C. of App., Fifth Circuit, 99 Fed. Rep. 49.

84. MORTGAGES—Foreclosure — Redemption.—Under Code, §§ 3507-3510, providing that a debtor or judgment creditor seeking to redeem land sold under mortgage must tender the purchase money and all "lawful charges" on the land, "lawful charges" mean a lien or incumbrance which would entitle the purchaser to hold the land as security; and hence, where the purchaser is the mortgagee, such redemptioners are not required to tender an unpaid balance due on the mortgage debt, since the foreclosure is a satisfaction of the mortgage, and the balance remaining due is no longer secured thereby.—FIRST NAT. BANK OF ANNISTON V. ELLIOTT, Ala., 27 South. Rep. 8.

85. MORTGAGE — Leasehold — Covenant.—In the absence of a provision in a mortgage of a leasehold interest permitting the mortgagor or his assigns to retain possession of the property till default, the legal title vests in the mortgagee and he has the absolute right of possession till the mortgage is paid; and therefore one to whom the mortgagor afterwards assigns the premises is not liable to the mortgagee on the covenant in the mortgage for payment of ground rent and taxes, there being no privity of contract between him and the mortgagee.—COMMERCIAL BLDG. & LOAN ASSN. OF RICHMOND, VA., V. ROBINSON, Md., 45 Atl. Rep. 449.

86. MUNICIPAL CORPORATIONS — Ordinances — Nuisance.—A municipality which has voluntarily passed under the dominion of Act No. 136 of 1898, cannot, under any general or implied authority, "suppress" or "locate" at pleasure a lawful business, which is not a nuisance *per se*, where the act confers authority, in specific terms, merely to prescribe regulations whereby the establishment in which such business is conducted shall be kept clean and in good order.—TOWN OF CROWLEY V. WEST, La., 27 South. Rep. 53.

87. MUNICIPAL CORPORATIONS — Ordinances—Regulation of Saloons.—When there are both special and general grants of power to municipal corporations to pass ordinances, those given under the special grant, as a

general rule, can only be exercised in the cases and to the extent as respects those matters allowed by the charter or incorporating act; and the powers given under the general grant do not enlarge or annul those conferred by the special grant in respect to its subject-matters, but give authority to pass ordinances, reasonable in their character, upon all other matters within the scope of the municipal authority not repugnant to the constitution and laws of the State.—MERNAUGH V. CITY OF ORLANDO, Fla., 27 South. Rep. 34.

88. MUNICIPAL CORPORATIONS — Parish—Liability for Torts.—A parish is an involuntary corporation vested with a portion of the political powers of the State, and exercises only a *quasi*-legislative authority. It is not liable in damages for torts or trespass committed upon the property of individual citizens to whom it sustains no private relations. In this respect the parochial differs essentially from the municipal corporation.—FISCHER LAND & IMPROV. CO. V. BORDELON, La., 27 South. Rep. 59.

89. MUNICIPAL CORPORATIONS — Telephones—Defective Sidewalks.—A town, having authorized a telephone company to erect poles in the streets, is not liable for injuries to a pedestrian caused by falling into a hole which the company had dug inside the curbing of the pavement of a sidewalk, and had negligently left uncovered an hour and a half before the accident, where the town had no actual notice of the company's negligence.—MAYOR, ETC. OF TOWN OF FRANKLIN V. HOUSE, Tenn., 55 S. W. Rep. 153.

90. NEGLIGENCE — Independent Contractor.—Where the owner of a vacant city lot, who for many years has suffered the public to use a thoroughfare over the same, employs an independent contractor to construct a building thereon according to certain specifications, including excavations for piling for the foundation, and the contractor digs a trench for such purpose across the thoroughfare, the owner is not liable for a personal injury sustained by one who falls into the trench by reason of its unguarded condition.—RIDGEWAY V. DOWNING CO., Ga., 34 S. E. Rep. 1028.

91. NEGLIGENCE—Injury to Brakeman—Contributory Negligence.—A brakeman, engaged in coupling freight cars, went between the rails, a few feet in front of an approaching train, for the purpose of inserting a link in the drawhead of the nearest moving car when it should reach him. There was several inches of snow upon the ground. He slipped when walking upon the track, and, falling, his leg was run over and crushed. Held, that he was guilty of negligence contributing to his injury.—CARRIER V. UNION PAC. RY. CO., Kan., 59 Pac. Rep. 1075.

92. NEGLIGENCE—Telegraphs — Erection of Poles.—A declaration alleging that plaintiff was injured by coming in contact, in the nighttime, with a pole which defendant telegraph company had carelessly, willfully, negligently, and unlawfully put within the chartered right of way of a certain turnpike does not state a cause of action against such company, where no fact showing the negligent erection of the pole is alleged.—CUMBERLAND TELEPHONE & TELEGRAPH CO. V. COOK, Tenn., 55 S. W. Rep. 152.

93. PARTNERSHIP—Dissolution—Rights of Creditors.—Though partners dissolve, one of them assuming the debts, and this is known to a creditor, yet the creditor retains still the right to treat all the partners as principals, not as sureties, unless such creditor agrees to look only to the one assuming the debts.—MCCOY V. JACK, W. Va., 34 S. E. Rep. 991.

94. PRINCIPAL AND AGENT — Evidence.—In an action by a broker for his commissions, plaintiff cannot establish the fact of his agency by proof of his own declarations to others in the course of his employment.—EHRENWORTH V. PUTNAM, Tex., 55 S. W. Rep. 190.

95. PRINCIPAL AND SURETY — Release of Sureties.—Where a bank is the owner and holder of a promissory note signed by D, as principal, and E and E as sureties, its failure to apply the moneys which D had on deposit in said bank subsequent to the maturity of the note, to its payment, will not release the sureties.—CITIZENS' BANK V. ELLIOTT, Kan., 59 Pac. Rep. 1102.

96. PUBLIC LAND — Homestead Entry.—The qualifications of an applicant for a homestead entry upon public lands are presented to the land department for determination when he applies to make entry, and the allowance of such homestead entry is a determination of such qualifications by the land department, and is binding upon the courts so long as such entry remains intact.—BROWN V. DONNELLY, Okla., 59 Pac. Rep. 975.

97. RAILROAD COMPANY — Liability for Exclusion of Passenger.—Under Sand. & H. Dig. § 6206, authorizing railroad companies to do all things which may be necessary to protect passengers on their cars from fraud, imposition, or annoyance, a railroad company is liable in damages for the exclusion of a passenger from a train leased to a private picnic association, for which the passenger held a ticket purchased from said association, although the exclusion was by members of the association, on the ground that plaintiff was an objectionable person, and without the knowledge of the railroad company.—MOORE V. ST. LOUIS, ETC. RY. CO., Ark., 55 S. W. Rep. 161.

98. RECEIVERS — Claim of Priority.—A claim for the purchase price of rails imperatively required to make a railroad safe for the transportation of persons and property will not be deemed a current debt which may be paid out of the current receipts of a railroad company in preference to a mortgage debt, if the repairs to the road needed to put it in proper condition are so extensive as to amount to a reconstruction or the construction of new road.—LACKAWANNA IRON & COAL CO. V. FARMERS' LOAN & TRUST CO., U. S. S. C., 20 Sup. Ct. Rep. 363.

99. RECEIVERS—Priority of Claims to Current Income.—The right to insert a claim against the property of a railroad company or its income, in preference to mortgage debts, is not at all affected by the sale of the property held by receivers, or by the fact of its transfer to a purchaser, where the rights of such claimant are expressly reserved by the court in the decree of sale and the order confirming the sale.—SOUTHERN RY CO. V. CARNEGIE STEEL CO., U. S. S. C., 20 Sup. Ct. Rep. 347.

100. SALES—Contract — Construction.—A contract to sell defendant a certain quantity of ice each month from April 1 to November 1, 1896, at a fixed price per ton, is free from uncertainty; and hence a contention that defendant was only liable to pay for ice actually delivered is untenable, though the parties made monthly settlements on that basis.—GARDNER V. CAYLOR, Ind., 56 N. E. Rep. 134.

101. SALES—Reservation of Title.—Plaintiff delivered a harvester to R under contract that it did not part with title until notes given therefor were fully paid, and in case of default it was, if it wished, to take possession of the harvester, and all payments thereon were to be retained as compensation for its use prior to the default. After default in payment, R sold the harvester to defendant for a valuable consideration. Held, that R having no title, but only a right to secure title, could convey none to defendant, and that plaintiff was the owner, and entitled to possession.—HOUSER & HAINES MFG. CO. V. HARGROVE, Cal., 59 Pac. Rep. 947.

102. SALE—Stoppage in Transitu—Insolvency.—If a vendor and vendee make an executory contract whereby the former sells to the latter certain goods, for which the latter agrees to pay at a time subsequent to the date of delivery, and if, before the time fixed for the delivery of the goods the vendee becomes insolvent and the vendor stops the goods *in transitu*, and resells them for less than the contract price, and thereupon brings an action against the vendee for the difference between the contract price and the price realized upon the resale, his declaration is fatally defective, unless it alleges either that he gave the vendee notice of his intention to resell, or that he made a tender of the goods and demanded payment, and the vendee refused to

take the goods or to pay for them.—DAVIS SULPHUR-ORE CO. v. ATLANTA GUANO CO., Ga., 34 S. E. Rep. 1011.

103. SCHOOLS AND SCHOOL DISTRICTS—Local Taxation—Constitutional Law.—Constitutional prohibition of local taxation in aid of schools is not to be inferred from the fact that the constitution has no provision whatever on the subject.—SOUTHERN RY. CO. v. ST. CLAIR COUNTY, Ala., 27 South. Rep. 23.

104. TAXATION—Constitutional Law.—Chapter 243 of the Laws of 1897, providing for the taxation of judgment is unconstitutional and void.—HAMILTON v. WILSON, Kan., 59 Pac. Pep. 1069.

105. TAXATION OF PERSONALTY—Leased Property.—Where the manufacture of an article of tangible personal property is protected by a patent, and such article, when manufactured, is not put on the market for sale, but its ownership retained by the manufacturer in himself, and the article leased or rented to another by him to another for a valuable consideration payable to him, it should be taxed as his property at "its true value in money," although that value is enhanced by reason of the patent. Its true value in money for taxation is the value that attaches to it in his hands.—ATTORNEY GENERAL v. HALLIDAY, Ohio, 56 N. E. Rep. 115.

106. TELEPHONE COMPANY—Failure to Deliver Message.—Where one could, on receiving a message notifying him of the dangerous sickness of his daughter, and telling him to come home at once, have come by team, or waited for a train, the operator was not justified in delaying delivery of the message on the assumption that he would wait for the train.—CUMBERLAND TEL. CO. v. BROWN, Tenn., 55 S. W. Rep. 155.

107. TELEPHONE COMPANIES—Laying of Conduits—Injunction.—A telephone company, which, under an ordinance, accepted by it, and statutes ratifying such contract, has a right, which cannot be taken away by the city, to lay conduits, in accordance with the ordinance, having filed with the city commissioner, as required by the ordinance, plans setting forth the location and character of the conduits proposed to be constructed, and having alleged willingness to construct them under the supervision of such commissioner, in accordance with the ordinance, injunction will issue restraining the city from interference with the construction, subject to modification in case the company refuses to obey the reasonable directions and regulations of the commissioner, or does anything reasonably prohibited by him.—CHESAPEAKE & P. TEL. CO. OF BALTIMORE CITY v. MAYOR, ETC. OF BALTIMORE, Md., 45 Atl. Rep. 446.

108. TRUSTEE—Misappropriation of Funds.—A person is not responsible for the misappropriation of trust funds by a trustee unless he knowingly participates or aids in committing the breach of trust.—FIRST NAT. BANK OF KINGMAN v. BYRNES, Kan., 59 Pac. Rep. 1056.

109. TRUSTS—Management — Interference by Cestui Que Trust.—A *cestui que trust* has no interest in the individual securities constituting the trust fund, nor any right to interfere with the trustee in the management of the trust estate; and where the *cestui que trust* assigns his interest in the trust estate, and the assignee causes notice of the assignment to be written on the margin of the record of each one of the mortgages held by the trustee, a decree ordering these entries to be stricken from the record is proper.—CHEYNEY v. GEARY, Penn., 45 Atl. Rep. 369.

110. UNLIMITED TICKET.—A railroad ticket, containing provisions respecting time limitation, non-transferability, etc., and an unsigned space for the signature of the purchaser is *prima facie* unlimited, notwithstanding the presence of punch marks in the margin indicating a time limitation; and such punch marks should be disregarded by the conductor of a train operated by the selling company where such ticket is presented, after the time limit so indicated has expired, by a passenger who claims, in apparent good faith, to have purchased it as an unlimited ticket, and to have been without any previous knowledge of a purported limitation.—WALKER v. PRICE, Kan., 59 Pac. Rep. 1102.

111. VENDOR AND PURCHASER — Contract of Sale.—A contract which conveys a lot of ground to another "for and in consideration of the price and sum of six hundred dollars cash in hand paid to the vendor, the receipt whereof is hereby acknowledged, and acquittance in full thereof granted," followed by a paragraph which recites, "The purchaser obligating himself, his heirs and assigns, to keep and support the vendor and her husband during their lifetime," is a contract of sale, and not a contract of rent, as defined by Rev. Civ. Code, art. 2779.—CHENEVERT v. LEMOINE, La., 27 South. Rep. 56.

112. VENDOR AND PURCHASER—Trust Deeds—Priority.—A deed of trust of land to secure a balance of the purchase price was recorded 19 minutes after the recording of a deed of trust given at the same time to secure an association which advanced the money for the cash payment, the association having knowledge of the deed to secure the balance of the purchase price. Held, that the deed of trust for the unpaid purchase price was the prior lien.—TRUESDALE v. BRENNAN, Mo., 55 S. W. Rep. 147.

113. WILLS—Codicil.—A later codicil, properly executed and attested, containing an express republication of the will and a prior codicil, validates the prior codicil, though it was not properly attested.—IN RE WALTON'S ESTATE, Penn., 45 Atl. Rep. 426.

114. WILL — Construction — Beneficiaries.—Where a will gives the whole residuary estate to all of testator's children in equal shares at the death of the widow, a codicil, added by testator, that "in the final division of my estate I desire that the grandchildren shall be taken into consideration, and that the estate shall be so divided that the grandchildren shall have equal shares," will be held to apply only in case of death of any of his children.—IN RE MCDOWELL'S ESTATE, Penn., 45 Atl. Rep. 419.

115. WILLS—Joint Legacy — Tenants in Common.—Where testator's will gave the use of his estate to his two daughters, M and J, share and share alike, during their lives, there being no contrary intention expressed, they take as tenants in common, and on the death of one the other is not entitled to the entire income.—HUMANSON v. ANDREWS, Conn., 45 Atl. Rep. 354.

116. WILLS — Remainders — Devise in Fee-Simple.—Testator devised part of his estate to his wife for life, remainder to plaintiff, and, in case of plaintiff's death during minority or without issue, then one half of the bequest to be divided among relatives named. Held, that at testator's death plaintiff acquired a defeasible fee-simple estate in the devise, which became absolute on the death of testator's widow during plaintiff's lifetime.—GAY v. DIBBLE, Conn , 45 Atl. Rep. 359.

117. WILLS—Specific Legacies—Contribution.—Where testator devised to his wife and brother each a house and contents, and provided that if his estate, other than the property so devised, and a legacy given to the wife, should not be sufficient to pay his debts and general legacies in full, such legacies should be paid pro rata, the devises of the house and contents, being specific, were not liable to contribution to pay general legacies.—PAGE v. ELDREDGE PUBLIC LIBRARY ASSN., N. H., 45 Atl. Rep. 411.

118. WRIT OF ERROR TO STATE COURT—Federal Question—Other Question Controlling.—The contention in a State court, that a contract for the payment of gold coin is invalid, will not be ground for writ of error from the Supreme Court of the United States, when the decree of the State court is for payment of a certain amount in dollars and cents, without specifying any particular kind of money, and this is affirmed by the supreme court of the State on the ground that the defendants have not been prejudiced by merely requiring them to respond in lawful money.—ROBERT RAE, JR., v. HOMESTEAD LOAN & GUARANTY CO., U. S. S. C., 20 Sup. Ct. Rep. 341.